DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-465
Title: Deborah K. Johnson, Acting Warden, Petitioner
v.
Tara Sheneva Williams
Docketed: October 13, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-56127)
Decision Date: May 23, 2011
Rehearing Denied: July 13, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 10 2011	Petition for a writ of certiorari filed. (Response due November 14, 2011)
Oct 10 2011	Appendix of Javier Cavazos, Acting Warden filed.
Nov 1 2011	Order extending time to file response to petition to and including December 14, 2011.
Dec 9 2011	Order further extending time to file response to petition to and including December 21, 2011.
Dec 21 2011	Brief of respondent Tara Sheneva Williams in opposition filed. (Distributed)
Dec 21 2011	Motion for leave to proceed in forma pauperis filed by respondent Tara Sheneva Williams. (Distributed)
Dec 28 2011	DISTRIBUTED for Conference of January 13, 2012.
Jan 4 2012	Reply of petitioner Javier Cavazos, Acting Warden filed. (Distributed)
Jan 13 2012	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 13 2012	Petition GRANTED limited to Question 1 presented by the petition.
Feb 10 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including March 28, 2012.
Feb 17 2012	The time to file respondent's brief on the merits is extended to and including May 29, 2012.
Mar 28 2012	Joint appendix filed. (Statement of costs filed)
Mar 28 2012	Brief of petitioner Deborah K. Johnson, Acting Warden filed.
Apr 4 2012	Brief amici curiae of Illinois, et al. filed.
May 29 2012	Brief of respondent Tara Sheneva Williams filed.
Jun 5 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 28 2012	Reply of petitioner Deborah K. Johnson, Acting Warden filed.
Jul 23 2012	SET FOR ARGUMENT ON Wednesday, October 3, 2012
Jul 24 2012	CIRCULATED.

Jul 27 2012	Record from U.S.D.C. for Central District of California received from Chamber of Judge Reinhardt of the U.S.C.A. for 9th Circuit.
Aug 7 2012	Record received fro U.S.C.A. for 9th Circuit. (1 envelope)
Oct 3 2012	Argued. For petitioner: Stephanie Brenan, Deputy Attorney General, Los Angeles, Cal. For respondent: Kurt D. Hermansen, San Diego, Cal.

PETITION FOR WRIT OF CERTIORARI

No. _____

In the Supreme Court of the United States

JAVIER CAVAZOS, ACTING WARDEN OF THE CENTRAL CALIFORNIA WOMEN'S FACILITY AT CHOWCHILLA, *Petitioner*,

v.

TARA SHENEVA WILLIAMS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.

2. Whether, under § 2254, a federal habeas court (a) may grant relief on the ground that the petitioner had a Sixth Amendment right to retain a biased juror on the panel and (b) may reject a state court's finding of juror bias because it disagrees with the finding and the reasons stated for it, even where the finding was rationally supported by evidence in the state-court record.

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PETITION FOR WRIT OF CERTIORARI

Javier Cavazos, Acting Warden of the Central California Women's Facility (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-53a) is reported at 646 F.3d 626. The district court's order (App. 57a-58a) and the magistrate-judge's report and recommendation (App. 59a-78a) are unreported. The opinion of the California Court of Appeal (App. 87a-118a) is unpublished.

JURISDICTION

The Ninth Circuit's opinion was filed on May 23, 2011 (App. 1a), and rehearing was denied on July 13, 2011 (App. 119a). This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. The State Court Trial

1. In 1999, respondent Williams and codefendant Carde Taylor were charged with the 1993 robbery-murder of Hung Mun Kim. At Williams's separate trial, the State produced evidence that Taylor had shot and killed Kim during a liquor store robbery; that Williams had told police that she had driven Taylor and another accomplice to Kim's liquor store and then had driven them away after the fatal shooting; and that Williams had been

the getaway driver in the prior robbery committed with Taylor.

2. During jury deliberations at Williams's trial, the judge received a jury note saying that one of the jurors had "expressed an intention to disregard the law" and had "expressed concern relative to the severity of the charge" of first degree murder. Outside the presence of the other jurors, the judge briefly questioned the juror foreperson about the note. Asked if the particular juror had committed misconduct by considering punishment or having a family member in a similar situation, the foreperson answered, "it's halfway to that," but the foreperson believed that the judge's clarification of a jury instruction (in response to another jury note) "may be sufficient to resolve [the] concern at this time." RT 1251-52. The judge then directed the jury to resume its deliberations.

The next day, the prosecutor requested additional questioning of the jury members and the discharge of Juror No. 6 for bias. Over the defense's objection, the judge allowed further inquiry.

a. Recalled for more questioning, the jury foreperson said that there had been a "fairly clear statement on [Juror No. 6's] part that connects the severity of the charge with—explicitly of first degree murder with his need for a higher standard of proof." RT 1271; see App. 97a-98a.

b. The judge expressed concern that Juror No. 6 was employing an illegal standard of proof by linking it to the severity of the charged offense. So he examined the juror. In that examination, Juror No. 6 denied using a higher burden of proof for the first-degree murder charge, and he denied that anyone had discussed the severity of the charge. But then, when asked if he had referred to the severity of the charge, Juror No. 6 "amend[ed]" his answer. He

now explained that he had said "'this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." He explained that "convinced beyond a reasonable doubt" and "very convinced beyond a reasonable doubt" were the same. Although agreeing that jurors should not use nullification, Juror No. 6 acknowledged that, in response to another juror "rais[ing] the question of whether juries always convict according to the law," he had answered that "sometimes they don't." RT 1278-82; see App. 98a-99a.

The judge said that he believed that Juror No. 6 had engaged in misconduct in that he was "applying a higher burden of proof than the law requires," and that, although Juror No. 6 "isn't lying, he had intentionally withheld honest information." The judge, however, undertook inquiry of the remaining jurors to develop a "fuller record." RT 1289; see App. 99a-102.

c. Most of the jurors stated that Juror No. 6 had expressed an unwillingness to follow the law. RT 1303-04 (Juror No. 2), 1309 (Juror No. 3), 1321 (Juror No. 5), 1329-30 (Juror No. 7), 1342-43 (Juror No. 10), 1347, 1350 (Juror No. 11), 1354 (Juror No. 12). Two jurors reported that Juror No. 6 had added, or felt he could add, words to the court's instructions to reflect what he thought the law should be. RT 1312-13, 1315 (Juror No. 3), 1342-43 (Juror No. 10). Another juror (No. 9) indicated that Juror No. 6 did not agree "with what the law said that [had been] read" to the jury and "didn't like [the law]." RT 1334.

Four jurors asserted that Juror No. 6 had been using a burden of proof higher than that of beyond a reasonable doubt. RT 1316 (Juror No. 3), 1325 (Juror No. 5), 1347 (Juror No. 11), 1354, 1356 (Juror No. 12). Two of these jurors explained that Juror No. 6

had expressed a need for proof beyond all doubt or "no doubt" and was requiring "[a]bsolute proof." RT 1347 (Juror No. 11), 1354, 1356 (Juror No. 12). Another juror (No. 10) said that Juror No. 6's "own beliefs" had been his standard and that his arguments had been based on a disagreement with the law and what he thought the law should say. RT 1344.

Similarly, many jurors reported that Juror No. 6 disagreed with California's vicarious-liability and felony-murder rules. For example, Juror No. 2 said that Juror No. 6 could not accept that Williams, who had not been the shooter, should face the same charge as her codefendant. RT 1303, 1305-06. Juror No. 5 said that Juror No. 6 felt "you can't charge somebody for something they didn't do if they weren't there at the time[.]" RT 1324. Juror No. 10 reported that Juror No. 6 had not believed that "the evidence showed that first degree murder should be the charge." RT 1346. According to Juror No. 11, the murder charge "kept coming into play" for Juror No. 6, "even when we were trying to discuss just the robbery." RT 1352. Juror No. 5, similarly, reported that Juror No. 6 had discussed the subject of penalty, RT 1321-23.

Two jurors reported that it was Juror No. 6 who had started the juror-nullification discussion; but they also said that Juror No. 6 had not expressed an intent to engage in nullification. RT 1294 (Juror No. 1), 1348 (Juror No. 11). Still, Juror No. 11 said that Juror No. 6 had discussed jurors "voting against" the law "in particular cases if they didn't agree with the law," and that Juror No. 6 felt that "the charge of murder was too strong in this case." RT 1347-49. Two other jurors that Juror No. 6, when asked if he had "social" or "political agenda," had responded by mentioning past trials in American history. RT

1326-27 (Juror No. 5), 1346 (Juror No. 10). Another juror (No. 7) said that one juror had discussed juror nullification and that, although the juror had not "sa[id] he was going to refuse to follow the law," he nevertheless had said that it is "a right of the jurors that if you didn't believe the law, . . . you were able to hang the jury." RT 1330.

d. On the other hand, Juror Nos. 9 and 12 opined that Juror No. 6 had simply been interpreting the law differently than the other jurors, RT 1335-39, 1354-55. Juror No. 4 agreed. RT 1319. And, when asked by defense counsel if there had been an "honest difference of opinion" between Juror No. 6 and the other jurors, Juror No. 1 answered, "Yes," and Juror No. 2 answered, "Well, I guess [Juror No. 6 is] being honest." RT 1291-92, 1305.

Juror No 1 reported that Juror No. 6 had not said he was applying a burden of proof higher than "beyond a reasonable doubt" because of the charge's severity, RT 1293; and Juror No. 12 did not feel that the charge's severity had entered into Juror No. 6's deliberation, RT 1354. Juror No. 9 said, further, that there had been no discussion of "historical juries." RT 1335.

At one point during the evidentiary hearing, the judge expressed his belief that Juror No. 6 lied to the court, stating that "a person would say that [Juror No. 6] is a liar and doesn't belong on the jury." He concluded "without any question, beyond any possible reasonable doubt that [Juror No. 6] was dishonest to us right here." RT 1301.

After all the jurors were examined, the judge dismissed Juror No. 6 for being "biased." RT 1359; App. 102a; see Cal. Penal Code § 1089 (permitting removal of a juror before or after submission of the case in the event of illness, death or other "good cause"). The judge explained: (1) that Juror No. 6

"had added his own words to the court's as to what the law is[,]" which indicated that he was "biased against the prosecution"; (2) that Juror No. 6 repeatedly referred to the severity of the charge in conjunction with bringing up juror nullification, indicating that he was improperly concerned about the severity of punishment; (3) that the challenged juror had been employing a burden of proof higher than that of "beyond a reasonable doubt"; (4) that the juror disagreed with the felony-murder rule; and (5) that the juror had been dishonest instating that no juror had discussed the severity of the charge or juror nullification. The judge concluded, "[I]n my opinion, [Juror No. 6] was lying in court. He has no business being a juror in this matter, and he is dismissed." RT 1359-61; see App.102a-103a.

3. Juror No. 6 was replaced. The jury convicted Williams the following day.

B. The State Appeal

On appeal, Williams claimed that the trial court had abused its discretion under California Penal Code section 1089 when it removed Juror No. 6 because the removal was unsupported by "good cause"—i.e., that there was insufficient evidence of "actual bias." She argued that the error was prejudicial because the removal of the "lone holdout" juror violated "her Sixth Amendment right to a unanimous jury[.]"

Describing Williams as "contend[ing] that the trial court erred by discharging one of the jurors during deliberations," the California Court of Appeal rejected her claim as "meritless." App. 97a.[1] The

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[1] The California Court of Appeal previously had affirmed Williams's conviction in an earlier decision, but the (continued...)

appellate court explained that Penal Code section 1089 permits a trial court "to discharge a juror who 'upon . . . good cause shown to the court is found to be unable to perform [his or her] duty.'" App. 103a (ellipses in original). Observing that actual bias is "cause" to dismiss a juror under California law, the court defined "actual bias" in terms of whether the juror was "impartial" as defined both by this Court for "federal constitutional purposes" and by California courts under state law. App. 104a. It explained that a trial court's dismissal decision is reviewed for abuse of discretion, and, relying on *People* v. *Cleveland*, 25 Cal. 4th at page 474, that the trial court's ruling must be supported by substantial evidence and that the juror's inability to perform must appear on the record as a "demonstrable reality." App. 103a.

Here, the state appellate court concluded, "[t]he evidentiary hearing supported the trial court's finding of bias." "According to most of the jurors," the state court observed, "Juror No. 6 had either explicitly said he would not follow the law or he had implied as much." Juror No. 6 "apparently rejected the notion that, because of vicarious liability, Williams and Taylor might be guilty of the same crime." App. 104a. And "[t]he trial court was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest." App. 104a-105a.

(...continued)
California Supreme Court subsequently remanded the case to the Court of Appeal for reconsideration in light of the then-recent decision in *People* v. *Cleveland*, 25 Cal. 4th 466, 106 Cal. Rptr. 2d 313 (2001), authorizing a trial court to dismiss a juror if "it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." *Cleveland*, 25 Cal. 4th at 484.

Rejecting Williams's argument that the trial court had erred under *Cleveland*, the panel accepted the trial judge's explanation that he had discharged Juror No. 6 "because he had shown himself to be biased, not because he was failing to deliberate or engaging in juror nullification." App. 105a. (original emphasis omitted).

The California Supreme Court denied further direct appellate review. App. 85a.

C. Habeas Corpus Proceedings

1. Williams filed a state habeas corpus petition, including the juror-removal claim, in the Los Angeles County Superior Court. That court denied the petition, ruling that the issues raised in the petition were "issues for direct appeal[,] not collateral attack." App. 83a-84a.

Williams next filed a federal habeas corpus petition in which she again challenged the removal of Juror No. 6. The federal district court stayed the proceedings to give Williams an opportunity to exhaust any available remedies in state court. So Williams filed state habeas petitions in the California Court of Appeal and California Supreme Court, again challenging the removal of Juror No. 6. Both courts denied the juror-removal claim because it had been raised and rejected on appeal and thus could not be raised again in a writ petition. See App. 15a n.4, 79a, 81a-82a.

2. After federal proceedings resumed, the magistrate judge filed a report recommending that Williams's petition be dismissed with prejudice. App. 59a-78a. The magistrate judge noted that the petition was governed by the deferential standard of review accorded to state-court merits adjudications under 28 U.S.C. § 2254(d). App. 65a-67a. Explaining that the trial court's factual finding of bias is entitled

to "special deference," the magistrate judge concluded that "the discharge of Juror 6 under the circumstances of this case did not constitute a constitutional violation[,]" and the "record amply supports the trial judge's determination that good cause existed for the discharge of Juror 6." App. 67a-70a. The district court adopted the report and recommendation and entered judgment dismissing the petition with prejudice. App. 55a, 57a-58a.

D. The Ninth Circuit Appeal

The Ninth Circuit Court of Appeals granted a certificate of appealability on the issue of "whether the trial court violated [Williams's] Sixth Amendment right to a fair trial when it dismissed juror number six." The parties argued the juror-removal issue expressly under the deferential-review standard of § 2254(d).

In a published opinion authored by Judge Reinhardt, the Ninth Circuit panel reversed the district court. The panel held, first, that the deferential-review standard in § 2254(d) did not apply because the California Court of Appeal had adjudicated "only [Williams's] section 1089 claim, but not her constitutional claim." App. 22a. According to the panel, Williams had presented "two arguments" on the juror removal claim: (1) "her section 1089 claim" that the trial court "abused the discretion accorded it by that statute to dismiss the jurors for cause"; and (2) "her constitutional claim . . . that the 'remov[al] and replace[ment]' of a holdout juror from 'a jury which had previously been deadlocked' violated her rights [to trial by an impartial jury] under the Sixth Amendment." App. 20a-21a; see App. 21a-23a n.8 & n.9. In the Ninth Circuit's view, the California Court of Appeal "did not consider

whether the removal of the known holdout juror violated the Sixth Amendment." App. 22a.

In reaching that conclusion, the Ninth Circuit dismissed the state appellate court's quotation from a state-court precedent that, in turn had quoted this Court's opinions in its "discussion of the federal constitutional principle of impartiality." The panel said that the state court had relied on this Court's precedent only in the context of discussing the state-law claim. This was insufficient, in the panel's estimation, because "[t]he section 1089 issue was distinct from Williams's constitutional claim: that the removal of Juror No. 6 violated her right to a fair trial." App. 22a-23a n.9. Further, the Ninth Circuit cited the fact that the California Court of Appeal had "provided a lengthy, reasoned explanation for its denial of Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly." App. 23a; see App. 23a-25a. Also, the panel said, the state court of appeal's adjudication of the section 1089 claim did not necessarily entail the adjudication of the constitutional claim because "California [in its *Cleveland* decision] does not appear to have considered . . . how the federal constitution constrains a trial court's discretion to discharge a juror from deliberations[.]" App. 25a-26a. The Ninth Circuit reasoned that the state court of appeal had conducted a "purely statutory analysis of whether the trial court had properly exercised its discretion under section 1089," but had not analyzed whether section 1089 was constitutional as applied. Thus, the deferential § 2254(d) standard was inapplicable. App. 28a.

Next, conducting *de novo* review of Williams's federal claim, the Ninth Circuit concluded that "the Sixth Amendment does not allow a trial judge to

discharge a juror on account of his views of the merits of the case." App. 31a-32a. "[I]n deciding whether to discharge a juror mid-deliberation," the Ninth Circuit explained that "the critical Sixth Amendment questions are whether, after an appropriately limited inquiry, it can be said that there is no reasonable possibility that the juror's discharge stems from his views of the merits, and whether the grounds on which the trial court relied are valid and constitutional." App. 34a.

Here, the Ninth Circuit found that the trial court's dismissal of the juror failed to satisfy those alleged constitutional criteria. App. 30a-52a. First, the panel held that Williams's "Sixth Amendment rights" were violated because, *even "presum[ing] all of the facts found by the state court to be correct, 28 U.S.C. § 2254(e)(1),"* "the record discloses a 'reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case.'" App. 39a (emphasis added) (quoting *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); see App. 34a-41a.

Second, as a reason for relief "independent" from the so-called "*Symington* violation," the Ninth Circuit determined that the "trial court lacked 'good cause' for removing the known holdout juror . . . ." App. 41a-42a. Specifically, it rejected the state court judge's bias finding—the "good cause" for discharging the juror—by rejecting the "reasons" or "bases" the state-court judge had given for that finding. App. 43a-44a. In this regard, the Ninth Circuit found, first, that the fact that "Juror No. 6 disagreed with the felony murder rule, . . . even if it constituted 'bias' under California law, was not 'good cause' for removing a deliberating juror, absent a finding that he was unwilling to follow the law due to his concerns about it." App. 44a-45a. The Ninth Circuit

next found that the trial court incorrectly determined that Juror No. 6 "was applying a higher-than-allowed burden of proof" and "clearly misstated what Juror No. 6 had testified to during the court's inquiry." App. 45a-48a. The Ninth Circuit further found that the trial court had incorrectly determined "that Juror No. 6 was concerned with the severity of the punishment, as opposed to the seriousness of the offense charged . . . ." App. 48a-49a. Finally, the Ninth Circuit found that the trial court wrongly determined that Juror No. 6 was "'lying in court'" based on the trial court's faulty "recollection of statements made in court by the juror," and not based on any "credibility determination . . . ." App. 50a-51a. The Ninth Circuit therefore concluded that "the removal of Juror No. 6 deprived Williams of her right to a fair trial by jury." App. 52a.

The State sought rehearing and hearing en banc. The State argued that § 2254(d) deference should have been applied because the California Court of Appeal had adjudicated Williams's federal juror-removal claim on the merits, and because the panel had failed to afford any deference to the trial court's factual findings. The Ninth Circuit denied the State's petition. App. 119a.

REASONS FOR GRANTING CERTIORARI

I. A SIGNIFICANT CIRCUIT CONFLICT EXISTS ON THE IMPORTANT QUESTION OF WHETHER THE DEFERENTIAL § 2254(D) STANDARD OF REVIEW APPLIES WHERE THE STATE COURT DENIED RELIEF IN AN EXPLAINED DECISION BUT DID NOT EXPRESSLY ACKNOWLEDGE THE ALLEGED FEDERAL BASIS FOR THE CLAIM

Last Term, this Court reversed the Ninth Circuit four times for its misapplication of the highly-deferential § 2254(d)[2] standard of review. Here, the Ninth Circuit held that deferential review did not apply in the first place because the state-court opinion explicitly referred to the federal basis for the petitioner's claim. The Ninth Circuit's "adjudication" ruling strikes at the heart of AEDPA's cornerstone reform of habeas corpus: deferential review of state court decisions rejecting the petitioner's federal claim on its merits.

This Court's opinions in *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam), and *Harrington* v. *Richter*, 131 S. Ct. 770, embrace an appropriately broader view of what qualifies as an adjudication on the merits. Thus, this Court held that § 2254(d) deference applied even when the state court's reasoned decision does not acknowledge this Court's

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[2] *Premo* v. *Moore*, 131 S. Ct. 733 (2011); *Harrington* v. *Richter*, 131 S. Ct. 770 (2011); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (per curiam); *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011); see also *Swarthout* v. *Cooke*, 131 S. Ct. 859 (2011) (per curiam).

precedents (*Packer*) and even when the state court issued an unexplained summary denial of the petitioner's claim (*Richter*). In contrast, the Ninth Circuit's unduly narrow interpretation of "adjudication on the merits" conflicts with that of other circuits—most recently that of the Eleventh Circuit in its *en banc* decision, *Childers* v. *Ford*, 642 F.3d 953 (11th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3055 (U.S. Jul. 6, 2011) (No. 11-42).

1. In *Packer*, this Court afforded § 2254(d) deference to a state court's decision where the state court had evaluated the "same claim" that the defendant later pursued in federal court, even though the state court addressed the pertinent federal issue only by reference to analogous state law and without citing federal cases. *Packer*, 537 U.S. at 7-8. This Court held that the statute "does not require citation of our cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.* at 8 (original emphasis omitted).

Last Term, in *Richter*, this Court built on *Packer* and held that the state court's summary denial of a claim was an adjudication on the merits of the federal claim for § 2254(d) purposes. *Richter*, 131 S. Ct. at 784. It observed that "no text" in AEDPA "requir[es] a statement of reasons." *Id.*

2. Following *Packer* and *Richter*, a conflict now has developed in the circuit courts on the question of whether a claim has been "adjudicated on the merits" in an explained state-court merits decision when the state court does not expressly address the federal claim. Most recently, the Eleventh Circuit, in its en banc decision in *Childers*, 642 F.3d at 968-69, took an approach contrary to that of the Ninth Circuit here. Under *Childers*, the state-

court decision denying relief is accepted as an "adjudication on the merits" unless the state court clearly stated that its decision rested solely on a state procedural rule. The Eleventh Circuit explained that this approach followed from this Court's "broad" interpretation of "adjudication on the merits" in *Packer* and *Richter* and the deference to the state courts' autonomy and dignity underlying that broad interpretation.

Also contrary to the Ninth Circuit's approach, the Eighth Circuit in *Cox* v. *Burger*, 398 F.3d 1025, 1029-30 (8th Cir. 2005), focused on whether the state court's "decision," even if it never discussed federal law, contradicts this Court's precedent in its reasoning or result. As the Eighth Circuit reasoned in *Cox*, § 2254(d) deference applied because the state court, in a reasoned opinion, had "effectively adjudicated [the petitioner's] Confrontation Clause claim on the merits through its analysis of [a state-law hearsay-exception rule]." *Id.* at 1030. The Eighth Circuit explained that "[t]he pertinent question is not whether the [state court] explicitly discussed the Confrontation Clause but whether its *decision* contradicted applicable Supreme Court precedent in its reasoning or result." *Id.* (emphasis added).

3. In conflict with the Eighth and Eleventh Circuits, the Ninth Circuit's decision here relied on pre-*Richter* and even pre-*Packer* circuit precedents in concluding that the state court had not adjudicated Williams's federal constitutional claim. App. 27a-28a (citing *Lyell* v. *Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006) (*de novo* review where petitioner "presented federal polling and fair-trial claims to the state court of appeals[,]" but "the state court of appeals addressed [the] claims only in state-law terms in its decision"); *Canaan* v. *McBride*, 395 F.3d 376, 382-83

(7th Cir. 2005) ("When a state court is silent with respect to a habeas corpus petitioner's claim, that claim has not been 'adjudicated on the merits' for purposes of § 2254(d)."); *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (§ 2254(d) did not apply where the state court "did not mention [petitioner's] Sixth Amendment claims, and the opinion does not contain any language, general or specific, indicating that those claims were considered and denied on the merits"); *Hameen* v. *Delaware*, 212 F.3d 226, 246-48 (3d Cir. 2000) (*de novo* review applied because, even though the state court relied on a Supreme Court precedent, it had read the case "too broadly");[3] *Weeks* v. *Angelone*, 176 F.3d 249, 262-63 (4th Cir. 1999) (where the state court "failed to address" one of petitioner's claim, § 2254(d) did not apply"), *aff'd*, 528 U.S. 225 (2000)).[4]

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[3] *Hameen* conflicts with this Court's later *Packer* decision because the *Hameen* court assumed that a state court's consideration of "controlling Supreme Court decisions" was necessary for an "adjudication on the merits." Compare *Hameen*, 212 F.3d at 248 with *Packer*, 537 U.S. at 8.

[4] *Canaan*, *Norde*, and *Weeks* are inapposite. In all three cases, the claims deemed not to have been adjudicated by the state courts were independent of the adjudicated claims. *Canaan*, 395 F.3d at 381-82 (where petitioner presented two ineffective-assistance-of-counsel claims and the state court did not "address" the second claim, no adjudication on the merits of the latter claim); *Norde*, 294 F.3d at 410-11 (no § 2254(d) deference to Sixth Amendment right-to-be-present and right-to-counsel claims where the state court addressed only a sufficiency-of-evidence claim and two prosecutorial-misconduct claims); *Weeks*, 176 F.3d at 262-63 (no § 2254(d) deference because the state court, when discussing two separately numbered "assignments of error", used "the singular term 'this contention,'" which the federal habeas court concluded referred only one claim). Here, by contrast, Williams's Sixth Amendment argument presented to the California Court of

(continued...)

4. To be sure, Judge Reinhardt's opinion here asserted that *Richter*'s teaching, that a state court is presumed to have adjudicated the merits of a federal claim presented to it "'in the absence of any indication or state-law procedural principles to the contrary,'" *Richter*, 131 S. Ct. at 784-85, also stands for the proposition that the presumption is overcome when a state court provides "a lengthy, reasoned explanation" but the state-court's reasoning does not "address[]"the federal constitutional claim. App. 23a; see App. 24a-25a. App. 24a (citing *Richter*, 131 S. Ct. at 784-85). But that assertion is flawed in at least three significant respects.

First, contrary to the Ninth Circuit's view, it is very improbable "that the [state] court simply neglected the [federal] issue and failed to adjudicate the claim[,]" App. 24a-25a (quoting *Richter*, 131 S. Ct. at 785). "Under the Supremacy Clause, state courts are *obligated* to apply and adjudicate federal claims fairly presented to them." *Sellan* v. *Kuhlman*, 261 F.3d 303, 314 (2d Cir. 2001) (emphasis added) (citing U.S. CONST. art. VI, § 2, and *Testa* v. *Katt*, 330 U.S. 386 (1947)). Here, absent a plain statement from the state court that it somehow was declining to consider any federal-law aspects of the juror-removal claim, it is "pure speculation . . . to suppose that happened in this case." See *Richter*, 131 S. Ct. at 785.

(...continued)
Appeal was not independent of her statutory argument, but rather was inextricably intertwined with it: she had argued that the trial court abused its discretion by removing the juror because it lacked good cause and that, *accordingly*, her Sixth Amendment unanimous jury right was violated.

Tellingly, respondent Williams never seemed to believe that the California Court of Appeal had failed to adjudicate any part of her juror-removal claim; for she never petitioned for rehearing to that court on that ground. Instead, she expressly argued that § 2254(d) applied in her appeal to the Ninth Circuit.

Second, the Ninth Circuit opinion took the quoted *Richter* language out of context. *Richter* relied on *Harris* v. *Reed*, 489 U.S. 255, 265 (1989), and *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803 (1991). But *Harris* endorsed treating the state-court decision as resting on federal-law grounds in the absence of a plain statement to the contrary by the state court. *Ylst* dealt with whether an unexplained state-court ruling should be interpreted as forgiving a previously-imposed procedural bar. Neither dealt with "some more exotic explanation for the state's purported failure to adjudicate the petitioner's federal claim." *Childers*, 642 F.3d at 969 n.16.

5. The Ninth Circuit's decision here, further, is inconsistent. In essence, the Ninth Circuit assumed that the state court did *not* adjudicate the merits of the federal aspect of a claim because the state court had issued no explicit statement that it was adjudicating the federal question.

a. But under the "plain statement" rule recognized in the procedural-bar context by this Court in *Michigan* v. *Long*, 463 U.S. 1032 (1983), and *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas court must presume that a state court decided a federal issue on its merits unless the state court "'clearly and expressly'" states that its decision is based on "'bona fide separate, adequate, and independent state grounds.'" *Coleman*, at 733 (quoting *Long*, at 1041); see *Harris* v. *Reed*, 489 U.S. at 264 ("plain statement" rule applies to both direct review and habeas). The same or a similar

presumption should apply when a federal court considers whether a state court adjudicated the federal component of a claim: the state court should be presumed to have decided the federal issue on its merits in the absence of a plain statement to the contrary. See *Richter*, 131 S. Ct. at 784-85; but compare *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005), with *Richter*, 131 S. Ct. at 784.

Moreover, interpreting § 2254(d)'s "adjudicated on the merits" requirement as the Ninth Circuit has, and in a manner "which does not purport to rest on any textual basis, could lead to deleterious substantive consequences," such as encouraging state prisoners to obscure their federal constitutional claims in their state court pleadings in the hope that the state court will overlook them, "thus entitling the prisoner to *de novo* consideration of these claims on federal habeas review." *Sellan*, 261 F.3d at 313-14.

Here, there was no plain statement by the state appellate court that it was refraining from considering any federal aspect of Williams's juror removal claim. In fact, the circumstances strongly suggest that it considered and ruled on the federal question. Noting that "actual bias" such as a state of mind preventing the juror from acting impartially amounts to cause for dismissing the juror under California law, the state appellate court considered how juror impartiality is assessed for "federal constitutional purposes." App. 104a (internal quotation marks omitted). In doing so, it quoted a California Supreme Court case that, in turn, had quoted this Court's precedents for their explanation of the Sixth Amendment right to an impartial jury. App. 104a (quoting *People* v. *Nesler*, 16 Cal. 4th 561, 580-81 (1997), in turn quoting *United States* v. *Wood*, 299 U.S. 123, 145-46 (1936), *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961), and *Reynolds* v. *United States*, 98

U.S. 145, 155 (1878), and citing *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982)). The state court thus equated the state-law definition of "actual bias"—i.e., the lack of entire impartiality—with the Sixth Amendment's guarantee of a fair trial by impartial jurors. See *Baker* v. *Blaine*, 221 F.3d 1108, 1112 (9th Cir. 2000) (state court adjudicates federal claim on merits if it either cites directly to federal authority or to cases that rest on federal authority).

b. In this respect, the Ninth Circuit's view in this case also conflicts with the First Circuit's decision last year in *Clements* v. *Clarke*, 592 F.3d 45, 53-55 (1st Cir. 2010), cert. denied, 130 S. Ct. 3475 (2010). There, the state-court opinion had cited only state cases in support of the state court's finding that "[t]he record shows no impropriety by the judge." *Clements*, 592 F.3d at 51-52. It found that there was a merits adjudication for AEDPA purposes. *Id.* at 52-56. "The real question," the First Circuit observed, "is not whether the state court opinion cited to any federal cases, but whether the opinion addresses a fairly raised federal issue." The "critical data point" was the state court's citation to a Massachusetts case that in turn had quoted this Court's decision, in *Irvin* v. *Dowd* that "'the right to a jury trial guarantees the criminally accused to a fair trial by a panel of impartial, "indifferent" jurors.'" *Clements*, 592 F.3d at 53-54. "Once the federal-rights backdrop is understood," the First Circuit concluded, "the [state] court's analysis was sufficient. AEDPA's trigger for deferential review is adjudication, not explanation." *Id.* While avoiding or overlooking a federal claim allows a federal court to "step into the breach," the First Circuit explained: "[J]udicial opacity is a far cry from judicial avoidance. It is the result to which we owe deference, not the opinion expounding it." See *id.* at 55-56.

The same is true here. Just as in *Clements*, the state appellate court here relied on a state-court precedent that in turn had relied on this Court's cases including *Irvin*. *Irvin* "was interpreting the Sixth Amendment right to a fair and impartial jury, the very same constitutional provision on which [Williams] stakes [her] claim for relief." See *Clements*, 592 F.3d at 54. Thus, as in *Clements*, "[o]nce the federal-rights backdrop is understood," the California Court of Appeal's decision was "sufficient" to trigger AEDPA deferential review in any event. See *id.* at 55.

* * * *

In sum, the Ninth Circuit's interpretation of "adjudication on the merits"—itself an important issue of nationwide concern—conflicts with the reasoning of this Court (*Richter*, *Packer*, *Coleman*, and *Long*) and with the decisions of the First Circuit (*Clements*), Eighth Circuit (*Cox*), and Eleventh Circuit (*Childers*).

II. THE NINTH CIRCUIT VIOLATED § 2254 BY INVOKING A RULE REQUIRING STATES TO SUFFER BIASED JURORS AND BY REJECTING FOR IMPERMISSIBLE REASONS THE STATE COURT'S FACTUAL FINDING THAT JUROR NO. 6 WAS BIASED

This Court should grant certiorari, further, because the Ninth Circuit erred in two other significant ways. First, in the name of the Sixth Amendment's right to a fair trial by an impartial jury, it required the State to suffer the presence of a juror found to be biased. Second, it impermissibly

rejected the state court's finding, rationally supported by the state-court record, that Juror No. 6 in fact was biased.

A. The Ninth Circuit Erred In Interpreting the Sixth Amendment as Precluding Removal of Juror No. 6 Even If He Were Biased

The Ninth Circuit erred in granting habeas corpus relief on the ground that the state court violated the Sixth Amendment by removing Juror No. 6 even if he were indeed biased. The Sixth Amendment guarantees a criminal defendant the right to a "fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722 (internal citations omitted); see *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968) (Sixth Amendment right to a fair trial by an impartial jury applies to state criminal defendants). It does not give the defendant a right to require retention of a biased juror. Here, however, the Ninth Circuit held that, even "presum[ing] all of the facts found by the state court to be correct," the dismissal was erroneous so as to require relief because "the record discloses a 'reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case.'" App. 39a (brackets in original). The Ninth Circuit's conclusion was wrong under *de novo* review and even more obviously was wrong as a matter of this Court's "clearly established Federal law" under deferential § 2254(d) review.

1. The panel purported to rely on the Ninth Circuit's decision in *Symington*, 195 F.3d at 1087. But the Ninth Circuit itself had previously explained that *Symington* "did *not* establish that such juror dismissals were inappropriate as a matter of

constitutional right." *Brewer* v. *Hall*, 378 F.3d 952, 957 (9th Cir.), cert. denied, 543 U.S. 1037 (2004) (emphasis added). Rather, *Symington* based its analysis on Federal Rule of Criminal Procedure 23(b), which permits the federal district courts to dismiss jurors for cause after deliberations have begun. *Id.* (citing *Symington*, 195 F.3d at 1085). The *Symington* test cannot be the basis for finding a federal constitutional violation supporting habeas corpus relief. 28 U.S.C. § 2254; *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991). Not does it qualify as "clearly established" law binding on the states for purposes of § 2254(d)(1) review. *Early* v. *Packer*, 537 U.S. at 10.

The Ninth Circuit's opinion asserted that "the D.C. Circuit's decision in [*United States* v.] *Brown*[, 823 F.2d 591 (D.C. Cir. 1987)], upon which *Symington* relied and we rely, was indisputably a constitutional decision"; so, the panel concluded, "we see no reason why the Sixth Amendment standard should be any different from the one announced in *Symington* for Rule 23." App. 38a n.16. But the *Symington* test (like the *Brown* and *Thomas*[5] tests it was built upon) is inapplicable to state criminal defendants such as Williams. The *Brown-Thomas-Symington* test protects a *federal* criminal defendant's federal constitutional right to a unanimous jury. *United States* v. *Kemp*, 500 F.3d 257, 303 & 304 n.26 (3d Cir. 2007); *Symington*, 195 F.3d at 1085; *United States* v. *Thomas*, 116 F.3d at 621; *United States v. Brown*, 823 F.2d at 595. That right, however, is *not* among the Sixth Amendment rights extended to *state* criminal defendants. *Apodaca* v. *Oregon*, 406 U.S. 404 (1972); see *Johnson* v. *Louisiana*, 406 U.S. 356 (1972). Because Williams

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[5] *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997).

did not possess a right to a unanimous jury under the "Constitution or laws or treaties of the United States," that right cannot form a basis for federal habeas relief. See § 2254(a), (d)(1). Thus, the Ninth Circuit was wrong to find a Sixth Amendment violation by applying a test inapplicable to Williams. And it would be even more wrong to conclude under the § 2254(d) deferential-review rule, that this Court's "clearly established Federal law" has dictated such an improbable rule that may be invoked by a federal habeas court as a basis for granting the writ.

2. Instead, the relevant Sixth Amendment inquiry for state convictions is whether the trial court's discharge of a juror violated the defendant's right to an impartial jury, irrespective of whether the juror was a holdout and irrespective of the party's motive for challenging the juror. Thus, "[o]ne touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith* v. *Phillips*, 455 U.S. at 217). That is, a juror may be removed for cause because of bias if the juror lacks impartiality; and the proper standard under the Sixth Amendment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985); see *United States* v. *Wood*, 299 U.S. at 133-34 ("[a]ll persons otherwise qualified for jury service are subject to examination as to actual bias," defined alternatively as "actual partiality"). The opposite of impartiality is bias. "Actual bias is, in essence, bias in fact—the existence of a state of mind that leads to the inference that the person will not act with entire impartiality." *Estrada* v. *Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008).

Therefore, the removal of a biased juror cannot violate a state criminal defendant's Sixth Amendment right. In light of the trial court's finding of bias here, removal of the juror supports no Sixth Amendment basis for relief.

The Ninth Circuit's holding, that there was error in removing Juror No. 6 even if he were indeed biased, was a perversion of the Sixth Amendment right. And, in any event, it finds no support in this Court's "clearly established" law.

B. The Ninth Circuit Failed to Abide by the Habeas Corpus Statute's Protection for State-Court Fact-Finding

As an alternate basis for relief, independent of the so-called "*Symington* violation," the Ninth Circuit also opined that Williams's Sixth Amendment fair-trial right was violated because the trial court lacked "good cause" (see Cal. Penal Code § 1089) in removing Juror No. 6. App. 41a-42a. The Ninth Circuit, however, erroneously rejected the bias finding by rejecting the "reasons" or "bases" for the finding notwithstanding that it was rationally supported by the evidence presented to the state trial judge. App. 43a-44a; see App. 44a-52a.

A trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Wainwright* v. *Witt*, 469 U.S. at 429. A trial court's bias determination is "essentially one of credibility, and therefore largely one of demeanor," so it is entitled to "'special deference.'" *Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984). As a "factual issue," it is accorded a presumption of correctness and may not be overruled by the federal court unless overcome by "clear and convincing

evidence." § 2254(e)(1); *Witt*, 469 U.S. at 429; *Yount*, 467 U.S. at 1038. Here, the state court's finding should have been accepted as correct because it was rationally supported by the state-court record. See § 2254(d)(2). The Ninth Circuit, however, did not properly apply the § 2254(e)(1) presumption or defer to the state court's reasonable factual conclusion. Instead of considering whether clear and convincing evidence rebutted that finding, see § 2254(e)(1), the Ninth Circuit primarily critiqued the reasoning process or the *reasons* given by the state court in making its factual finding of bias. App. 43a-52a; see App. 102a-103a (trial judge ruling that Juror No. 6 is "dismissed without any question in [the judge's] mind as a biased juror[,]" and then enumerating the "number of ways" that "[h]is bias is shown"). For example, the Ninth Circuit dismissed many of the trial court's "reasons" for the bias finding as "misstatement[s] of the record that made [the trial court's] conclusion[s] unreasonable." App. 46a, 49a, 51a (citing *Taylor* v. *Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)).

In relying on such criticisms, the Ninth Circuit failed to consider, let alone resolve, the determinative § 2254(e)(1) question: whether "clear and convincing" evidence refuted the state court's factual finding of bias. The (e)(1) presumption gives federal courts "no license to redetermine credibility of witnesses whose demeanor has been observed by the State trial court, but not by them." *Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1982); *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (per curiam). "Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." *Rice* v. *Collins*, 546 U.S. 333, 341-42. Neither § 2254(d)(2) nor (e)(1) allows a

federal habeas corpus court to reweigh the "cold" record of the state-court evidentiary hearing and reject state-court factual determinations rationally supported by the evidence simply just because it disagrees with it or is dissatisfied with the state court's reasoning process. See *Rice*, 546 U.S. at 341-42; *Witt*, 469 U.S. at 434.

The Ninth Circuit's dissection of the state-court reasoning underlying its factual finding of bias was beside the point, for it did not even purport to find that the state-court record provided no support for the finding or that clear and convincing evidence showed that Juror No. 6 had not been biased. To the contrary, as the state appellate court concluded, the trial-court evidentiary hearing "supported the trial court's finding of bias" because "[a]ccording to most of the jurors, Juror No. 6 had either explicitly said he would not follow the law or he had implied as much[]." Juror No. 6, moreover, "apparently rejected the notion that, because of vicarious liability principles, Williams and Taylor might be guilty of the same crime." App. 104a; see also App. 97a-102a (summary of jurors' testimony). The state court further explained that "[t]he trial judge was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest." App. 105a. By examining the state court's underlying reasoning, instead of whether the evidence rationally supported the judge's ultimate finding of bias, and by concluding that those "reasons" did not support the juror's removal for cause, the Ninth Circuit asked and answered the wrong questions.

This Court, of course, has in the recent past twice reversed the Ninth Circuit—in *Felkner* v. *Jackson*, 131 S. Ct. 1305, and in *Rice* v. *Collins*, 546 U.S. 333—for similar judicial disregard of state-court

fact findings. Here, as in *Felkner* and in *Rice*, it once again strayed far beyond the bounds of appropriate federal habeas review of state-court fact finding.

* * * *

Having repeatedly misapplied AEDPA's highly-deferential standard of review, the Ninth Circuit here has circumvented it altogether. [6] As demonstrated by this Court's many grants of certiorari to review and reverse Ninth Circuit judgments flawed by "judicial disregard" of the deferential § 2254 standard, the Ninth Circuit's errors here warrant this Court's attention too.

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[6] See, e.g., *Williams* v. *Adams*, No. 09-55192, 2011 WL 3605314, *1 n.1 (9th Cir. Aug 17, 2011).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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APPENDIX

No. 15-65

In the Supreme Court of the United States

JAVIER CAVAZOS, ACTING WARDEN OF THE CENTRAL CALIFORNIA WOMEN'S FACILITY AT CHOWCHILLA, *Petitioner*,

v.

TARA SHENEVA WILLIAMS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

TARA SHENEVA WILLIAMS *Petitioner -Appellant,* v. JAVIER CAVAZOS, Acting Warden of the Central California Women's Facility in Chowchilla, California *Respondent-Appellee.*	No. 07-56127 D.C. No. CV-03-02691-GW OPINION

Appeal from the United States District Court for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted
August 2, 2010–Pasadena, California

Filed May 23, 2011

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt, Circuit Judge, and Ronald M. Whyte, Senior District Judge.*

Opinion by Judge Reinhardt

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*The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Kurt David Hermansen, San Diego, California, for the petitioner-appellant.

Stephanie C. Brenan, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

REINHARDT, Circuit Judge:

Consider two scenes:

Scene One

Juror # 8:	I just want to talk.
Juror # 7:	Well, what's there to talk about? Eleven men in here think he's guilty. No one had to think twice about it except you.
Juror # 10:	I want to ask you something: do you believe his story?
Juror # 8:	I don't know whether I believe it or not — maybe I don't.
Juror # 7:	So how come you vote not guilty?
Juror # 8:	Well, there were eleven votes for guilty. It's not easy to raise my hand and send a boy off to die without talking about it first. . . . We're talking about somebody's life here. We can't decide in five minutes. Supposin' we're wrong.

Scene Two

Juror # 6:	I said . . . this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt. . . .

Foreman: We have spent some time now trying to understand the reasonable basis for his doubt, and I personally did not yet understand it. . . . I would say that two-thirds of the jurors have tried to persuade — have actively tried to persuade . . . him that his current view is incorrect. . . .

Juror # 4: Well, I guess he believes from the evidence that he's seen that there hasn't been sufficient proof. . . .

Juror # 5: I think the question may have been raised: "Do you have a political agenda?" I think [it] might have been in the heat of the argument, because it does get heated back and forth from a bunch of different people. It may have been said. . . .

Juror # 9: Well, he said this is a serious thing, and I don't really feel that there is enough cause for — or something to that effect. . . . What he said was, "I wouldn't want to take anyone's freedom away, unless," you know, "I was sure that certain things took place.". . . .

The first passage above is dialogue from the classic Academy Award-winning 1957 film, *Twelve Angry Men*, in which Henry Fonda plays a holdout juror who, over two tense hours, convinces his eleven peers that the defendant in a murder trial should be acquitted. The second excerpt comes from the transcript of proceedings during the petitioner's murder trial, in which each juror was examined and cross-examined, *seriatim* and mid-deliberation, after it was reported that one juror was taking a different view from the others. In the end, the trial court dismissed that juror on the ground that he was "biased" against the prosecution. With an alternate juror in place, the jury returned a guilty verdict.

Twelve Angry Men made for great drama because it violated the sanctity of the jury's secret deliberations by allowing the audience into the jury room. It was, of course, a work of fiction. We are presented here with a similar intrusion into heated deliberations involving a holdout juror, except that this one took place in open court, and it resulted in a woman being convicted and sentenced to life imprisonment after the holdout was dismissed. Under the precedent that existed when petitioner's conviction became final (and exists today as well), the trial court's actions violated the petitioner's Sixth Amendment rights, as incorporated with respect to the states under the Fourteenth Amendment. We therefore conclude that petitioner is in custody in violation of the Constitution, reverse the judgment of the district court, and remand with instructions to grant the writ.

I. BACKGROUND

A. The Offense

One afternoon in October 1993, petitioner Tara Sheneva Williams agreed to drive around two friends, Carde Taylor and Schantel W., to case out stores for a potential robbery later that night. The third or fourth store they visited was a liquor store, which Taylor and Schantel entered while Williams waited in the car. The two emerged a few seconds later, but then Taylor went back in, pointed a gun at the proprietor and, in the course of emptying the cash register, shot and killed him. After being arrested in 1998 and initially denying knowledge of the crime, Taylor and Williams both admitted to being present and that Taylor had killed the owner. Williams told the police that, while she knew Taylor was armed, there had never been a plan to rob the store during daylight hours.

Taylor and Williams were each charged with special circumstances murder and a firearm enhancement, and they were tried separately. After a five-day jury trial, Williams was found guilty of murder with special circumstances as charged and the firearm enhancement. The jury found that a handgun was used in the commission of the crime. She was later sentenced to life imprisonment without the possibility of parole.[1]

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[1] Taylor was convicted as well, and sentenced to a life term without the possibility of parole, plus five years.

B. The Jury Deliberations

Williams was convicted only after the trial court dismissed a known holdout juror and replaced him with an alternate. This dismissal, and the events leading up to it, form the basis of her claim for habeas relief.

Two days after the jurors began deliberations, the jury foreman delivered two notes to the trial court. The first read:

> Relative to jury instruction 17.[41].1,[2] I wish to inform you that we have one juror who: 1) has expressed an intention to disregard the law . . . and 2) has expressed

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[2] That instruction is California's anti-jury nullification instruction, which states:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

California Jury Instructions — Criminal, CALJIC No. 17.41.1 (1998 New) (6th ed. 1996) (brackets in original). The Supreme Court of California has since barred the use of this instruction, "believ[ing] [it to] ha[ve] the potential to intrude unnecessarily on the deliberative process and affect it adversely — both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors." *People v. Engelman*, 28 Cal.4th 436, 440 (2002). The trial court's use of this instruction is not at issue here.

> concern relative to the severity of the charge (1st degree murder).

The second asked:

> Is it legally permissible for a juror to interpret page 32 of the jury instructions to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future?

The trial court called the jury into the courtroom and informed its members that the answer to the second question was "no." All the jurors except for the foreman were asked to leave, and the court proceeded to question him regarding the first note.

1. Jury Foreman (Juror No. 8)

The foreman first confirmed that no juror had "expressed any concern about punishment or the punishment that one might expect to flow from a certain conviction," which the jury had been expressly instructed it could not do. When asked what was meant by the phrase "has expressed concern relative to the severity of the charge," the foreman answered that the juror in question "has probably ten or fifteen times in our conversations so far expressed that . . . he doesn't believe that there's sufficient evidence —." At this point, the court interrupted the foreman and informed him that he could not speak to "how jurors view the evidence" but could only express concern with whether there was "misconduct." As an example of misconduct, the court described a situation where a juror "says something like, I can't convict anybody of first degree murder because of the punishment or something like that, or I had a cousin in a similar situation, and I

wouldn't want the person here to suffer what, you know, my cousin went through, something like that." The foreman then responded: "I think it's halfway to that, and so I think that one's a little iffy, and I think your answer to the first part may be sufficient to resolve our concern at this time."

Upon the People's motion, and over Williams's objection, the court halted jury deliberations and questioned the foreman again the next day. According to the foreman, on the first day of deliberations, Juror No. 6 had brought up historical instances "when juries have refused to follow the law," such as in pre-Civil War prosecutions for harboring fugitive slaves and during the Vietnam War era for burning draft cards. The foreman expressed his opinion that Juror No. 6 had "a belief . . . that [there] is a civic responsibility to — there's a name for this — civil disobedience. There's a responsibility to be disobedient in that case." However, the foreman testified that when he had asked Juror No. 6 explicitly "if that's what was going on here," the juror answered "no."

The foreman testified that Juror No. 6 had expressed his view that first degree murder was a severe charge which affected the "way he interprets the evidence and the standard he uses for doubt." Juror No. 6, according to the foreman, had made a "fairly clear statement . . . that connects the severity of the charge with — explicitly of first degree murder with his need for a higher standard." The foreman conceded that Juror No. 6 had not explicitly expressed an unwillingness to follow the law or the jury instructions on the standard of proof. He also agreed that the juror had attempted to explain "the

basis for his reasonable doubt" to the other jurors many times and had actively engaged in "intellectual conversation with them, listening to their questions, trying to answer them."

2. Juror No. 6

The court called in Juror No. 6 for questioning. Juror No. 6 testified that no juror had indicated being motivated by the issue of possible punishment in the case, and that no juror had even used the word "punishment." He denied using a higher burden of proof based on the severity of the first degree murder charge, and stated, "I think that the same burden of proof should be used for any criminal offense, higher than a civil trial, but all criminal trials should have — whether it's first degree murder or not should have the same burden of proof." He recalled the court's instruction regarding what constituted proof beyond a reasonable doubt, and testified that he agreed to follow it as he understood it. He expressed his understanding of the instruction as: "not proof — there's always some possible doubt in any human affair, but if you have a reasonable doubt based on the evidence and only on the evidence that was presented at trial, if you have a reasonable doubt about a defendant's guilt, under the law, you are required to vote not guilty."

The prosecutor asked, "Has anyone discussed the severity of the charge?" Juror No. 6 responded, "No, not that I recall." The court then interjected, "Just to be clear, have you made reference during deliberations to the severity of the charge?" And Juror No. 6 replied, "No, I — Well, let me amend that. I said I can remember saying this is a very

important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt. Other than that, I did not make a reference to the severity of the case — the severity of the charge."

The court asked Juror No. 6 about the difference between proving a criminal charge under the standard of "beyond a reasonable doubt" and proving the same charge under the standard of "very convinced beyond a reasonable doubt." Juror No. 6 began to answer "No, they're the same standards as far as —" when the court cut him off, asking, "What does 'very convinced' add?" Juror No. 6 responded, "It just means . . . it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced — if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial." He then stated a second time that "convinced beyond a reasonable doubt is the standard, and I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt. I think it's the same thing."

Juror No. 6 also expressed his view that "jurors should not use juror nullification." He stated, "They should base their decisions on the evidence that was presented at a particular trial and only on that evidence." Juror No. 6 was later asked again whether the jurors had discussed jury nullification. He responded that another juror had "raised the question whether juries always convict according to the law," and that he had responded, "sometimes they don't," and had shared his knowledge of

historical cases in which the law "was not always enforced" and "became impossible to enforce, because juries would not convict people who were clearly in violation of it."

After Juror No. 6 was excused, the prosecutor asked the court to remove him. The court stated that it was "inclined to rule that the juror has engaged in misconduct. He's applying a higher burden of proof than the law requires . . . and . . . he isn't lying, but intentionally withheld honest information." The court noted that Juror No. 6 had "contradicted himself," because he initially answered that no juror had discussed juror nullification or the seriousness of the charge, but later admitted that he had responded to a juror's question about jurors not following the law. But the court decided to first question the other jurors about Juror No. 6, in order to develop a "fuller record."

3. The Other Ten Jurors

Over the next two hours, the trial judge, prosecutor, and defense counsel questioned each of the remaining jurors, one by one. Six jurors (Nos. 3, 5, 7, 10, 11, and 12) stated that, in their opinion, Juror No. 6 was not following the law. When questioned further, however, four of those six (Nos. 5, 7, 11, and 12) acknowledged that Juror No. 6 had never said as much, but two (Nos. 3 and 10) reported that Juror No. 6 had said, "in essence," that he would not follow the law. The other four (Nos. 1, 2, 4, and 9) thought that Juror No. 6 was following the law, and, in the words of Juror No. 2, was "being honest." Those jurors thought there was just a difference in opinion over how the law applied to the facts of the

case. Juror No. 9, for example, explained that Juror No. 6 had tried to explain his view, "but none of us really understood it the way he did." Only five jurors (Nos. 1, 2, 5, 7, and 11) mentioned jury nullification at all, of which just one (No. 2) thought Juror No. 6 might actually be engaging in the practice. Additionally, two jurors (Nos. 2 and 5) made comments to the effect that Juror No. 6 disapproved of the theory of accomplice liability. Six jurors (Nos. 2, 3, 4, 9, 10, and 11) explained that Juror No. 6 did not believe that the evidence was sufficient to prove guilt of murder beyond a reasonable doubt.

4. The Trial Court Decision

After the inquiry concluded, the court dismissed Juror No. 6 under California Penal Code section 1089, which provides for the discharge of jurors for good cause.[3] The court ruled that its dismissal of Juror No. 6 was "not because he's not deliberating and not because he's not following the law." Instead, "he is dismissed without any question in my mind as a biased juror," because "his mind is bent . . . against the prosecution," as evidenced by his statements

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[3] In relevant part, the statute reads:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, *or upon other good cause shown to the court is found to be unable to perform his or her duty*, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

Cal. Penal Code § 1089 (emphasis added).

concerning the government's burden of proof, his disagreement with the felony-murder rule, and his "dishonest[y]" in recounting whether anyone had discussed the severity of the charge or juror nullification. The court then concluded that Juror No. 6 "was lying in court" and "has no business being a juror in this matter," and so dismissed him.

c. Subsequent Proceedings

An alternate juror replaced Juror No. 6 immediately. The following day, the jury returned a guilty verdict against Williams for first degree murder. Williams appealed, claiming that the trial court had both abused its discretion in applying section 1089 and violated her Sixth Amendment rights. The California Court of Appeal affirmed her conviction on the state-law ground, but did not address her Sixth Amendment claim at all. The Supreme Court of California then granted review, ordered the Court of Appeal decision vacated, and remanded the case for reconsideration in light of its recent decision, *People v. Cleveland*, 21 P.3d 1225 (2001).

On remand, the Court of Appeal issued a slightly modified version of its prior opinion and again affirmed Williams's conviction. The Court of Appeal reiterated that the trial court "discharg[ed] Juror No. 6 because he had shown himself to be biased, *not* because he was failing to deliberate or engaging in juror nullification." Again, the court did not address her Sixth Amendment challenge. The Supreme Court of California denied Williams's second petition for review without comment, over Justice Kennard's dissent. Her conviction became final on July 9, 2002,

when the time to petition the United States Supreme Court for a writ of certiorari expired.

Williams then sought relief in federal court.[4] The district court denied the petition, and Williams timely appealed.

II. STANDARD OF REVIEW

Williams filed her federal habeas petition in 2003, so it is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To determine whether we apply "AEDPA deference" here, we must consider which state court "decision" we review, and whether that decision actually "adjudicated" Williams's Sixth Amendment claim on the merits.

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[4] Williams's initial *pro se* petition was stayed pending exhaustion of state post-conviction remedies. Both the Court of Appeal and the Supreme Court of California denied her state habeas petitions on the ground that her claim concerning juror discharge had already been decided on direct appeal.

A

It has long been the practice of federal habeas courts to "look through" summary denials of claims by state appellate courts and review instead the last reasoned state-court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991); *see, e.g., Kennedy v. Lockyer*, 379 F.3d 1041, 1052 (9th Cir.2004). Following the Supreme Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), we continue to adhere to that practice, at least with respect to cases in which state courts of last resort have exercised their discretionary authority to deny petitions for review. In *Richter*, the Court held that summary denials of *original* petitions for habeas corpus filed in the Supreme Court of California should "be presumed" to be "adjudicated . . . on the merits." *Id.* at 784-785. The question in *Richter* arose because state habeas petitions in California are presented to the state Supreme court as original petitions, rather than as requests for review of lower-court rulings denying relief; accordingly, the Supreme Court of California must actually adjudicate each habeas petition. Noting that "the California Supreme Court disposes of . . . more than 3,400 original habeas corpus petitioner" each year, the *Richter* Court observed that "[t]he issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Id.* at 784. It thus determined that the summary nature of the court's disposition of its thousands of original habeas petitions in no way undermines any presumption that they are decisions on the merits. *Id.* at 784-785.

A state court's decision to deny *discretionary* review is entirely different. On direct appeal of a decision by a state court of appeal in a non-capital case, the Supreme Court of California has the authority to choose whether or not to grant review. *See* Cal. R. Ct. 8.500. As when the United States Supreme Court denies a petition for certiorari, the California high court's decision to deny a petition for review is not a decision on the merits, but rather means no more than that the court has decided not to consider the case on the merits. *See, e.g., Camper v. Workers' Comp. Appeals Bd.*, 836 P.2d 888, 894 n.8 (Cal. 1992) ("[W]e reiterate the well-established rule in this state that a denial of a petition for review is not an expression of opinion of the Supreme Court on the merits of the case."); *see also People v. Davis*, 81 P. 718 (Cal. 1905) ("The significance of such refusal [by the Supreme Court to accept a case for review] is no greater than this — that this court does not consider that the interests of justice, or the purposes for which the power [to transfer cases for review] was given, require its exercise in the particular case."). That is, under California law, the state supreme court's discretionary denial of a petition for review is decidedly not a decision on the merits. *Cf. Richter*, 131 S. Ct. at 785. Accordingly, in this case, the Supreme Court of California's denial of Williams's second petition for review — seeking review of the California Court of Appeal opinion issued on remand from the Supreme Court of California — was not a decision on the merits. We therefore continue to "look through" the state supreme court's denial of discretionary review to the last reasoned state court decision, which here is the second California Court of Appeal opinion on Williams's direct appeal.

B

We must next consider whether the Court of Appeal adjudicated Williams's Sixth Amendment claim on the merits. We conclude that it did not.

Most of the time, any claim a federal habeas court is able to consider on the merits will first have been "adjudicated on the merits in State court proceedings," and thus the strictures of § 2254(d) apply. That is so because the most common reason a claim would not have been adjudicated on the merits — it was never raised in state court — is itself a bar to federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion). Occasionally, however, a federal habeas petitioner brings a claim that *was* raised in state court but *was not* decided on its merits — because, for example, the claim was dismissed on a procedural ground that itself is inadequate to bar federal review, there was no need to address the claim in light of a precursor holding, or, as here, the court simply failed to decide the claim without explanation.[5] In such cases, when it is clear that the "[state] courts did not reach the merits of [the petitioner's constitutional] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court

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[5] That no decision on the merits was issued is, of course, no indication itself of a failure to exhaust; "[i]t is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Smith v. Digmon*, 434 U.S. 332, 333, 98 S.Ct. 597, 54 L.Ed.2d 582 (1978) (per curiam).

proceedings'"; "[i]nstead, the claim is reviewed de novo." *Cone v. Bell*, 129 S. Ct. 1769, 1784 (2009) (quoting 28 U.S.C. § 2254(d)).[6]

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[6] *See also Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (because state court never reached "prejudice" prong of ineffective assistance of counsel claim, that issue was reviewed de novo); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same); *Nulph v. Cook*, 333 F.3d 1052, 1056–1057 (9th Cir. 2003) (state court dismissed state habeas petition for failing to state a claim under Oregon habeas law, so "AEDPA's deferential standard . . . does not apply in this case because the state court did not reach the merits of Nulph's due process claim"); *Taylor v. Bowersox*, 329 F.3d 963, 968 (8th Cir. 2003) (de novo review because claim was not decided on the merits by the state court, which had dismissed the claim as having been previously litigated); *Pirtle v. Morgan*, 313 F.3d 1160, 1165, 1167 (9th Cir. 2002) (state court declined to adjudicate claim on state post-conviction review under its "relitigation rule," although the issue had not actually been raised on direct review, so federal habeas court reviewed claim de novo); *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002) ("Here, the Appellate Division's opinion on direct review addressed only Norde's arguments that the evidence relating to the physical injury was insufficient, that the prosecutor was improperly allowed to make prejudicial remarks during summation, and that the prosecutor's inquiry into Norde's prior convictions was prejudicial. The court did not mention Norde's Sixth Amendment claims, and the opinion does not contain any language, general or specific, indicating that those claims were considered and denied on the merits. . . . . Because the Appellate Division never indicated in any way that it had considered Norde's Sixth Amendment claims, we find that those claims were not adjudicated on the merits, and therefore that the AEDPA's new, more deferential standard of review does not apply." (internal citation omitted)); *Appel v. Horn*, 250 F.3d 203, 210–211 (3d Cir. 2001) (de novo review after state supreme court had wrongly "recharacterized" petitioner's constructive-denial-of-counsel claim as an ineffective-assistance-of-counsel claim, and as a result "failed to adjudicate [the] denial of counsel claim on the merits"); *Weeks v. Angelone*, 176 F.3d 249, 262-263 (4th Cir. 1999) (de novo review when state supreme court "failed to address" a properly raised

De novo review in these infrequent circumstances is consistent with "the basic structure of federal habeas jurisdiction," which is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 131 S. Ct. at 787. When those "principal forum[s]" are provided the opportunity to adjudicate constitutional challenges but fail to do so, whether intentionally or inadvertently, the only remaining forum — the federal courts — must do so in the first instance. Habeas review under such circumstances neither "frustrates . . . [the States'] good-faith attempts to honor constitutional rights" — for the State has made no attempt to do so — nor "disturbs the State's significant interest in repose for concluded litigation" — since an issue in the litigation was left unconcluded. *Id.* (internal quotation marks omitted).

This is one of those rare cases in which a claim was properly raised and yet was not decided by the state court.[7] Before the Court of Appeal, Williams

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claim); *Fisher v. Texas*, 169 F.3d 295, 300-302 (5th Cir. 1999) (de novo review when state court had dismissed claim on procedural grounds, not merits, and state then failed to assert the procedural default in federal habeas litigation); *Moore v. Parke*, 148 F.3d 705, 708–710 (7th Cir. 1998) (de novo review when state decision was based on procedural error that was not an "adequate" state ground for the decision).

[7] Counsel for the State acknowledged at oral argument that nothing in the Court of Appeal decision suggests that the court considered the Sixth Amendment argument. Audio recording of oral argument at 27:21 to 29:30:

Reinhardt, J: Where in its decision did the Court of Appeal decide the question of whether there was a Sixth Amendment violation?

made two arguments relevant to the issue now before us. First, citing numerous state court decisions construing section 1089, she argued that the trial court abused the discretion accorded to it by that statute to dismiss jurors for cause. Pet'r Cal. Ct. App. Br. 7-8. Second, she presented her constitutional claim by arguing that the "remov[al] and replace [ment]" of a holdout juror from "a jury which had previously been deadlocked" violated her rights under the Sixth Amendment. Pet'r Cal. Ct. App. Br. 9; *see also id.* at 41-42.[8]

Deputy A.G.: What we're looking at is they were applying what was California law. The 1089, I believe, of the Penal Code, and saying that California state court properly applied that. I think that, specifically they didn't get into a Sixth Amendment question, but if you look at, for our purposes, what we have are really no U.S. Supreme Court authority that would govern this particular type of situation . . . .

Kozinski, C.J.: That was a very long answer. . . . It wasn't a good answer; it was just a long answer. I take it the answer is "no" to Judge Reinhardt's question. The Court of Appeal did not discuss the Sixth Amendment. . . . Is there anything more than "no" by way of an answer to the question Judge Reinhardt asked?

Deputy A.G.: "No" would answer it.

Kozinski, C.J.: It is not discussed. The Court of Appeal does not discuss the Sixth Amendment.

Deputy A.G.: The Court of Appeal does not discuss the Sixth Amendment. Correct.

[8] Specifically, Williams relied upon *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997), which recognized that the "Sixth

The Court of Appeal proceeded to adjudicate only her section 1089 claim, but not her constitutional claim. It held that the trial court did not abuse its discretion under section 1089, because sufficient evidence supported the trial court's finding that Juror No. 6 met the definition of "actual bias" under the statute. It did not consider, however, whether the removal of the known holdout juror violated the Sixth Amendment.[9]

Amendment right to a jury trial" could be offended by "the dismissal and replacement of . . . jurors" under section 1089 in some circumstances, although there was no violation on the facts of that case. Pet'r Cal. Ct. App. Br. 41-42 (citing *id.* at 1426). The substance of Williams's federal claim was just that: Because "Juror No. 6 was a holdout juror for acquittal" who "questioned the sufficiency of the People's evidence to prove appellant's guilt beyond a reasonable doubt," the court "denied [Williams] her Sixth Amendment right" by dismissing him. Pet'r Cal. Ct. App. Br. 41. Moreover, citing federal cases, Williams argued that in this case the "questioning [of all jurors] was a severe intrusion onto the secrecy of the jury's deliberations to the extent it elicited their subjective thought processes during those deliberations," which violates an "essential" constitutional feature of the "proper functioning of juries." Pet'r Cal. Ct. App. Br. 14-15 & n.12. Williams also asserted that Juror No. 6's discharge violated her right to a unanimous jury verdict. Pet'r Cal. Ct. App. Br. 9; *see also id.* at 41-42. Although there is no *federal* right to jury unanimity in state court, *see Apodaca v. Oregon*, 406 U.S. 404, 412 (1972), California does provide such a right, *see People v. Feagley*, 14 Cal.3d 338, 350 n.10 (1975), and Williams's argument was that the Sixth Amendment does not allow a juror whose vote is essential to the verdict to be removed because he is known to be in favor of the defendant, whatever the vote required to convict. In California, which requires jury unanimity, the removal of even a lone holdout juror violates that right to a fair trial by jury.

[9] In reviewing the trial court's exercise of discretion

To be sure, a state court may adjudicate the merits of a constitutional claim without citing federal precedent, and such a decision would be entitled to AEDPA deference. *See, e.g., Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). And under *Richter*, even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied," we must "presume[ ] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 784-785. Here, however, the Court of Appeal's decision was *not* "unaccompanied by an opinion explaining the reasons relief has been denied," *id.* at 784; rather the court provided a lengthy, reasoned explanation for its denial of Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly.[10]

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under section 1089, the court did quote a California Supreme Court case's discussion of the federal constitutional principle of impartiality. The section 1089 issue was distinct from Williams's constitutional claim: that the removal of Juror No. 6 violated her right to a fair trial by jury.

[10] In contrast, in *Murdoch v. Castro*, 609 F.3d 983 (9th Cir. 2010) (en banc), a plurality of the en banc court determined that the California Court of Appeal had "discuss[ed] and quote[d] from the section of [the petitioner's] brief in which he raised" his federal constitutional claim and had cited a state case that discussed the federal constitutional right. It therefore stated that the state court had adjudicated the petitioner's constitutional claim on the merits, even though it "addressed [the] argument only obliquely." *Id.* at 990 n.6 (plurality opinion). Unlike in *Murdoch*, here the state court did not address Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the Court of Appeal decided the constitutional claim, in addition to a separate claim that it

It is obvious, not "theoretical" or "speculat[ive]," that Williams's constitutional claim was not adjudicated at all, and so the *Richter* presumption is overcome. *Id.* at 785. Specifically, the portion of the court's opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying section 1089. That the court engaged in an extended discussion of Williams's *statutory* claim, but made no mention whatsoever of her more fundamental *constitutional* claim, is a compelling "indication" that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision. *Cf. id.* at 785. Put differently, when a court simply says "claims denied," and nothing more, we presume the denial is on the merits and as to all claims, *see id.* at 784-785, but when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, "there is reason to think" that it "is more likely" that the

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discussed at length. The *Murdoch* court found an "indication" that the state court had adjudicated the constitutional claim on the merits; here, the total disparity between the court's treatment in the opinion of Williams's statutory claim (reasoned in detail) and her constitutional claim (not mentioned at all) provides a strong "indication" that the claim was never adjudicated on the merits.

court simply neglected the issue and failed to adjudicate the claim.[11]

Even then, the Court of Appeal's decision might be entitled to deference if adjudicating the section 1089 claim necessarily entailed adjudicating the Sixth Amendment claim. That would be the case if, for example, California had ever defined the limit of "discretion" to discharge a juror to be at, or short of, the Sixth Amendment boundary. Were that so, a Court of Appeal finding that the trial court had not abused its discretion under section 1089 might implicitly be a determination that the Sixth Amendment had not been violated, and we might be required to consider that Williams's Sixth Amendment claim had been adjudicated on the merits. *Cf. Baker v. Blaine*, 221 F.3d 1108, 1112 (9th Cir. 2000) ("The state court decisions to which the district court gave deference either cited directly to opinions of the Supreme Court of the United States or to cases which themselves rested on Supreme Court precedent, and the state court holdings were

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[11] Our "reason to think some other explanation for the state court's decision is more likely" comes in part from common sense and our own experience as sometimes-fallible judges. *Id.* When we write thorough 29-page decisions as the state court did here, yet completely fail to address a particular issue, even in an oblique, tangential, or summary manner, it is most often because we so focused on the remainder of the opinion that we overlooked the issue we did not mention directly or indirectly. Just as we occasionally make mistakes and overlook an argument raised on appeal, so too do our state-court peers. It is most unlikely that the state court methodically analyzed each issue presented on appeal except one, a substantial claim of the violation of a federal constitutional right, which it chose to deny on the merits without saying a word.

consistent with the reasoning of the cited cases," so AEDPA deference should apply).

California does not appear to have considered, however, how the federal constitution constrains a trial court's discretion to discharge a juror from deliberations, so the *Baker* approach to recognizing indirect state determinations of federal constitutional claims does not apply.[12] *Cleveland* was not a constitutional decision; rather, the California Supreme Court defined the limits of a trial court's discretion to conduct evidentiary hearings into juror misconduct, and to dismiss jurors for good cause under section 1089, based on various "policy considerations" and its precedent interpreting section 1089.[13] 21 P.3d at 1231. In so doing, the court expressly *rejected* the juror-discharge standard adopted by the Second, Ninth, and D.C. Circuits. *See* 21 P.3d at 1236-1237 (declining to adopt, among others, *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), in favor of a more permissive standard). So it is entirely possible that a juror

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[12] By contrast, California *has* considered constitutional limitations in restricting a trial court's discretion to instruct a jury once an alternate juror has been added to the group. Citing constitutional concerns, *People v. Collins*, 552 P.2d 742 (1976), held that a trial court must direct the jury to disregard past deliberations and begin anew when an alternate juror joins. *Id.* at 745-747.

[13] In this respect, *Cleveland* was a California equivalent of *Brasfield v. United States*, 272 U.S. 448 (1926) or *Jenkins v. United States*, 380 U.S. 445 (1965) (per curiam), cases in which the Supreme Court set limits on district courts' interference with jury deliberations pursuant to its supervisory power, rather than the Constitution. *See Lowenfield v. Phelps*, 484 U.S. 231, 239-240 & n.2 (1988).

discharge under section 1089 that is permissible under *Cleveland* could nonetheless violate the Sixth Amendment. Indeed, Justice Werdegar wrote separately in *Cleveland* to raise the concern that a trial court might not abuse its discretion but nonetheless "trench upon a defendant's right to trial by jury" — a concern that the majority did not meet with any response. *Cleveland*, 21 P.3d at 1239 (Werdegar, J., concurring) (internal quotation marks omitted). The Court of Appeal's determination that the trial court did not abuse its discretion under section 1089 thus did not resolve Williams's Sixth Amendment claim, even indirectly.

Instead, we are presented with a case more like the one considered by the Third Circuit in *Hameen v. Delaware*, 212 F.3d 226 (3d Cir. 2000). The petitioner in that case alleged that the "double counting" of an aggravating circumstance in the penalty phase of his capital murder trial resulted in an Eighth Amendment violation. *Id.* at 246-247. In its opinion, the Delaware Supreme Court decided that the challenged aggravating factor did not constitute impermissible double-counting under Delaware's death penalty statute, but it did not decide his Eighth Amendment claim, apparently believing its death penalty statute to be facially constitutional. *Ferguson v. State*, 642 A.2d 772, 781-783 (Del. 1994); *see Hameen*, 212 F.3d at 247. Reviewing that decision, the Third Circuit determined that the Delaware Supreme Court "did not pass on Ferguson's Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so." *Hameen*, 212 F.3d at 248. Accordingly, with no state decision on the merits to which to apply AEDPA

deference, it reviewed de novo. *Id.* Other courts have faced similar situations. *See, e.g., Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006); *Canaan v. McBride*, 395 F.3d 376, 382-383 (7th Cir. 2005); *Norde*, 294 F.3d at 410; *Weeks*, 176 F.3d at 262-263.

As in *Hameen*, the Court of Appeal here conducted a purely statutory analysis of whether the trial court had properly exercised its discretion under section 1089, a statute that was known to be facially constitutional. *See Miller v. Stagner*, 757 F.2d 988 (9th Cir.), *amended on other grounds*, 768 F.2d 1090 (9th Cir. 1985). But a determination that the trial court did not apply section 1089 erroneously as a matter of state law did not resolve Williams's federal claim: that section 1089 *as applied* in her case violated the Sixth Amendment, a claim that the State acknowledges the Court of Appeal did not decide. *See supra* at 638 n.7. Absent a state court adjudication of that claim on the merits, we must review the claim de novo here.

C

One other potential bar to considering Williams's Sixth Amendment claim merits only brief discussion. The pre-AEDPA standards that govern this case include the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), which limits the constitutional claims that may be presented to a federal court sitting in habeas to exclude those "new rule[s]" that were announced after the defendant's conviction became final, with certain exceptions. *Id.* at 301 (plurality opinion). Because "the AEDPA and *Teague* inquiries are distinct," the Supreme Court has directed that "in addition to performing any

analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam). A *Teague* claim may be waived by the State, however, and so we need not consider *Teague* where, as here, the state does not raise it. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). We note, in any event, that Williams does not seek retroactive application of a "new rule" of constitutional law, but rather relies upon cases that were decided years before her conviction became final in 2002, namely *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), and *United States v. Brown*, 823 F.2d 591 (D.C.Cir. 1987).[14] Thus, even if

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[14] Because AEDPA's deferential standard of review does not apply, Williams is not limited to presenting violations of federal law that were "clearly established . . . as determined by the Supreme Court of the United States" at the time her conviction became final. 28 U.S.C. § 2254(d)(1). Rather, under *Teague* she may also rely upon law that had been established by the federal courts of appeals when her conviction became final. *See Bell v. Hill*, 190 F.3d 1089 (9th Cir.1999) (finding no *Teague* problem "despite the fact that Bell bases his Sixth Amendment claim specifically on Ninth Circuit precedent rather than Supreme Court precedent"); *see also Terry Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., for the Court) ("With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.") (citations omitted); *id.* at 381 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) ("[Section 2254(d)(1)] extends the principle of *Teague* by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ.") (internal quotation marks omitted). Of course, where *Teague* is not raised the courts are free simply to apply the Constitution

a *Teague* issue were properly raised, it would not affect our review.

III. THE MERITS

We turn, at last, to the merits of Williams's claim. Williams argues that the trial court violated her Sixth Amendment right to a fair trial by dismissing a juror who was known to be the lone holdout for acquittal. Reviewing her claim de novo, we agree, for two reasons: (1) there was a reasonable possibility that the request for the juror's discharge stemmed from his views of the merits of the case, and (2) the grounds on which the court relied did not amount to "good cause" to remove a known holdout juror, and thus violated the Sixth Amendment. Accordingly, we reverse.

A

As a general matter, the Sixth Amendment does not prohibit the mid-deliberation dismissal of jurors who are unable to serve or who engage in misconduct. In *Miller*, for example, we found no constitutional violation in the dismissal of two jurors after deliberations had begun: one of whom was sick with the flu, and another who had been intoxicated the previous morning and had fallen asleep during the rereading of testimony. 757 F.2d at 995. To the contrary, we held that the "California substitution procedure followed by the trial court" — Penal Code section 1089 — was constitutional because it "preserved the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." *Id.*

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de novo.

(quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)). It appears that every court to have considered the question agrees that some mid-deliberation substitutions are permissible under the federal Constitution.[15]

[1] It is just as clear, however, that the Sixth Amendment does not allow a trial judge to discharge a juror on account of his views of the merits of the

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[15] *See, e.g., Claudio v. Snyder*, 68 F.3d 1573, 1577 (3d Cir. 1995) (juror illness); *Peek v. Kemp*, 784 F.2d 1479, 1483-1484 (11th Cir. 1986) (en banc) (emotional distress and physical illness); *United States v. Hillard*, 701 F.2d 1052, 1057 (2d Cir. 1983) (illness); *United States v. Phillips*, 664 F.2d 971, 992-993 (5th Cir. Unit B 1981) (heart attack); *Henderson v. Lane*, 613 F.2d 175, 178-179 (7th Cir. 1980) (heart attack); *see also Commonwealth v. Carnes*, 933 N.E.2d 598, 614-615 (Mass. 2010) (upon discovering juror's material misrepresentations on juror questionnaire). Such unanimity is perhaps surprising given that this rule is in derogation of the jury practice at common law, which was "to discharge the entire panel and begin de novo by forming a new jury" when "a juror has become incapacitated by illness or death after the jury is impaneled and sworn in chief." *People v. Peete*, 202 P. 51, 65 (Cal. Ct. App. 1921); *see also West v. State* 28 So. 430, 431 (Fla. 1900); *State v. Hasledahl*, 52 N.W. 315, 316 (N.D. 1892).

Some states, however, prohibit juror substitutions after the case has been submitted to the jury under state law. *See, e.g., Claudio v. State*, 585 A.2d 1278, 1301 (Del. 1991) (state constitution); *Crossland v. Commonwealth*, 291 S.W.3d 223, 230 (Ky. 2009) (by rule); *Hayes v. State*, 735 A.2d 1109, 1120 (Md. 1999) (by rule); *State v. Dushame*, 616 A.2d 469, 472 (1992) (by statute); *State v. Sanchez*, 6 P.3d 486, 494 (N.M.2000) (by rule); *People v. Ortiz*, 705 N.E.2d 1199, 1199 (N.Y. 1998) (by rule, forbidding substitutions except upon the defendant's in-court, written consent); *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn. 1991) (state constitution). California, of course, is not among them. *See* Cal. Penal Code § 1089.

case. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), which incorporated the Sixth Amendment with respect to the states, the Supreme Court explained,

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor *and against the compliant, biased, or eccentric judge.* If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Id. at 156 (emphasis added).

The Court later elaborated, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from *that group's* determination of guilt or innocence." *Williams*, 399 U.S. at 100 (emphasis added). The jury is the only actor permitted to determine guilt — not the judge. It is well-

established, of course, that "a judge may not direct a verdict of guilty no matter how conclusive the evidence" in a criminal case. *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947). It would similarly vitiate the "essential" role of a jury to act as a "safeguard" against both the power of the state and the court for a judge to selectively dismiss jurors based on the views of the merits of the case they express during deliberations. Such dismissals are thus prohibited as well, because a court cannot "do indirectly that which it has no power to do directly." *Sparf v. United States*, 156 U.S. 51, 106 (1895).

[2] Indeed, no one, including the judge, is even supposed to be *aware* of the views of individual jurors during deliberations, because a jury's independence is best guaranteed by secret deliberations, such that jurors may "return a verdict freely according to their conscience" and their "conduct in the jury room [may be] untrammeled by the fear of embarrassing publicity." *Clark v. United States*, 289 U.S. 1, 16 (1933). As Justice Cardozo wrote, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.* at 13. To be sure, maintaining the secrecy of deliberations might limit a court's ability to investigate alleged misconduct. Nevertheless, as the Second Circuit has explained,

> Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils — protecting the secrecy of jury deliberations

> at the expense of possibly allowing irresponsible juror activity. Achieving a more perfect system for monitoring the conduct of jurors in the intense environment of a jury deliberation room entails an unacceptable breach of the secrecy that is essential to the work of juries in the American system of justice. To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself.

United States v. Thomas, 116 F.3d 606, 623 (2d Cir. 1997).

Accordingly, in deciding whether to discharge a juror mid-deliberation, the critical Sixth Amendment questions are whether, after an appropriately limited inquiry, it can be said that there is no reasonable possibility that the juror's discharge stems from his views of the merits, and whether the grounds on which the trial court relied are valid and constitutional. If the answer to either question is no, the removal of the juror violates the Sixth Amendment. We will discuss the two questions separately.

B

In cases such as *Miller* involving juror illness or intoxication, it is obvious that the basis for discharge is independent of the juror's views of the merits. Indeed, in *Miller*, the views of the dismissed jurors were not even known. 757 F.2d at 995. Other cases have presented more uncertain circumstances. In *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997), a habeas petitioner claimed a violation of his Sixth

Amendment rights when a known holdout juror was dismissed for good cause under section 1089. At an *in camera* hearing, the juror, a twenty-year-old woman, "told the judge that she was distressed and that she did not want the responsibility of deciding whether Perez was guilty," and requested to be dismissed. *Id.* at 1424. Over the prosecution's objection, the court denied the request and encouraged her to continue deliberating. Shortly after deliberations resumed, the foreperson reported "difficulties in the jury room," and the court suspended deliberations again. *Id.* The juror said she was not "emotionally able to continue deliberations," *id.* at 1428, and the jury foreperson confirmed that "it started to be a very emotional thing with the jurors where basically no one could try to make an intelligent decision when you're dealing with somebody that's basically in pieces," *id.* at 1425. The next morning, the court dismissed the juror on the basis that "she is just emotionally out of control." *Id.* Deferring to the "trial court's findings regarding juror fitness," we found no Sixth Amendment violation in the replacement of that juror after her repeated requests to be dismissed. *Id.* at 1426. Because "the record shows that the [trial] court was forced to act, *not* because of [the juror]'s status as a holdout juror, but because of [her] emotional inability to continue performing the essential function of a juror — deliberation," we accepted the state court's decision. *Id.* at 1427 (emphasis added); *accord id.* at 1428 ("[B]ecause there is *no evidence* to suggest that the trial court's decision was motivated by [the juror]'s views on the merits of the government's case, we affirm the . . . denial of habeas relief." (emphasis added)).

In *United States v. Brown*, 823 F.2d 591 (D.C.Cir. 1987), by contrast, the D.C. Circuit held unconstitutional the dismissal of a juror who requested to be discharged after five weeks of deliberations. The juror told the court that "the problem" he had was "the way the R.I.C.O. conspiracy act reads. . . . If I had known at the beginning of this trial what the act said, I would have not said I could be impartial." *Id.* at 594. He acknowledged that he "disagree[d] with the law," but did not say he would refuse to follow it. Rather, he stated, "If the evidence was presented in a fashion in which the law is written, then, maybe, I would be able to discharge my duties." *Id.* Reviewing this episode, the D.C. Circuit held that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." *Id.* at 596. "A discharge of this kind," the court explained, "would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case. Such a result is unacceptable under the Constitution." *Id.* Recognizing that "the reasons underlying a request for a dismissal will often be unclear," and that "a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations," the court held that "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Id.* Because there was a "substantial possibility that [the juror] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction," the court determined that the

defendant's Sixth Amendment rights had been violated. *Id.*

We adopted *Brown* in 1999, in a case involving the prosecution of Arizona Governor Fife Symington III. During deliberations, the jury sent the court two notes requesting guidance, because "[o]ne juror has stated their [*sic*] final opinion prior to review of all counts," and the jury felt "that the juror in question cannot properly participate in the discussion with us" because she was unable to maintain focus on the topics of discussion and she refused to discuss her views with the other jurors. *Symington*, 195 F.3d at 1083. While being questioned individually, each juror confirmed the concerns raised in the notes, although "some jurors indicated that their frustration with [the juror] may have derived more from their disagreement with her on the merits of the case, or at least from their dissatisfaction with her defense of her views." *Id.* at 1084. The juror testified that she simply disagreed with the majority and she was willing to discuss the case with the other jurors, but that she had "bec[o]me intimidated" by the demands of the other jurors to justify her views. *Id.* The court dismissed the juror, on the ground that she was "either unwilling or unable to deliberate with her colleagues." *Id.*

[3] On appeal, we determined that "[w]hile there may have been some reason to doubt [the juror]'s abilities as a juror, there was also considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case." *Id.* at 1088. We therefore reversed, reasoning that "if the record evidence discloses any reasonable

possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087 (emphasis omitted). We reached that conclusion because to allow dismissal under the circumstances presented would permit a court "[t]o remove a juror because he is unpersuaded by the Government's case," which would violate a defendant's rights.[16] *Id.* at 1085 (internal quotation marks omitted). We also acknowledged that a detailed inquiry into the jurors' thinking and

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[16] A later AEDPA case, *Brewer v. Hall*, 378 F.3d 952 (9th Cir. 2004), which was decided long after Williams's conviction became final, characterized *Symington* as a decision under Federal Rule of Criminal Procedure 23(b), not the Sixth Amendment. Although we would not have reached the same conclusion as the Brewer court — *Symington* plainly adjudicated a Sixth Amendment challenge, *see* 195 F.3d at 1085 & n.2 — we are now bound by and therefore accept its description of *Symington*. Because we review the Sixth Amendment question presented here de novo, we may nevertheless treat *Symington* as instructive on the question of when it is constitutionally permissible to dismiss a juror mid-deliberations for reasons that could be merits-related. *Brewer* did not actually decide what the Sixth Amendment *does* require in cases of mid-deliberation juror discharge, since that case did not concern juror discharge, so the question remains open for us to answer even if *Symington* did not already answer it. *See* 378 F.3d at 955-956. Given that the D.C. Circuit's decision in *Brown*, upon which *Symington* relied and we rely, was indisputably a constitutional decision, we see no reason why the Sixth Amendment standard should be any different from the one announced in *Symington* for Rule 23. We therefore hold that, to comply with the Sixth Amendment, "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Symington*, 195 F.3d at 1087 (emphasis omitted).

motivations would "compromise the secrecy of jury deliberations" and "jeopardize the integrity of the deliberative process." *Id.* at 1086. We thus recognized that while a trial court's inability to resolve any ambiguity concerning alleged misconduct would result in the juror remaining empaneled, to do otherwise would, in the words of the Second Circuit, "destroy the jury system itself." *Thomas*, 116 F.3d at 623.

[4] Following *Brown's* holding and *Symington's* reasoning, we hold that the discharge of Juror No. 6 violated Williams's Sixth Amendment rights.[17] Even if we presume all the facts found by the state court to be correct, 28 U.S.C. § 2254(e)(1), we conclude that the record discloses a "reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case." 195 F.3d at 1087. At least seven jurors expressed the view that Juror No. 6 did not believe that the evidence was sufficient to prove guilt of murder beyond a

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[17] The Sixth Amendment protection required by *Brown* and foreshadowed by *Symington* is against improper interference with jury deliberations. Freedom to deliberate without coercion is a necessary component of "the interposition between the accused and his accuser of the common-sense judgment of a group of laymen," which is "the essential feature of a jury." *Williams*, 399 U.S. at 100. This component of the Sixth Amendment is thus incorporated with respect to the states through the Due Process Clause of the Fourteenth Amendment. In *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), for example, we held that improper coercion had broken a jury deadlock to produce the ten-to-two vote needed to convict under Oregon law, and granted habeas as a result. Similarly, the deadlock-breaking dismissal of a holdout juror on an improper basis is an unconstitutional form of interference with deliberations.

reasonable doubt, thereby making a total of two-thirds of the panel. The jury foreman testified that Juror No. 6 "has probably ten or fifteen times in our conversation so far expressed that . . . he doesn't believe that there's sufficient evidence." Juror No. 2 said, "He didn't believe that whatever was in evidence was enough evidence for him." Juror No. 3 affirmed that Juror No. 6 "didn't believe that the evidence that was shown in trial was sufficient to prove the severe charge of murder." Juror No. 4 said, "Well, I guess he believes from the evidence that he's seen that there hasn't been sufficient proof." Juror No. 9 stated, "he didn't feel that there was enough proof of it [first degree murder]." Juror No. 10 said, "He didn't believe the evidence showed first degree murder should be the charge." And Juror No. 11 testified, "he said it [the evidence] wasn't proof beyond a reasonable doubt." The juror's views regarding the insufficiency of the evidence were thus made known to the prosecution as the result of a rigorous inquiry into the thought process and reasoning of Juror No. 6. Neither the trial court nor the Court of Appeal, however, even mentioned this clear evidence regarding the juror's views as to the merits, or acknowledged the strong possibility that Juror No. 6 was a holdout juror for legitimate reasons.

[5] As in *Brown*, "[g]iven the [reasonable] possibility" that the request to discharge the juror "stemmed from his belief that the evidence was inadequate to support a conviction, we must find that his dismissal violated" the defendant's Sixth Amendment right. 823 F.2d at 597. A comparison to the facts of *Symington* makes this violation all the more clear. In *Symington*, the evidence of juror

misconduct was far greater than it was in the case before us, but even then we held that the juror's dismissal was improper given the "considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case." *Symington*, 195 F.3d at 1088. The other jurors in that case were *unanimous* in their view that the discharged juror, a woman in her mid-70s, was both unable to participate in deliberations and unwilling to discuss her views. *Id.* at 1083. Here, the other jurors' views as to Juror No. 6's willingness to follow the law were mixed and the trial court ultimately did not find that he was unwilling to do so when deciding to discharge the juror; also, most of the jurors recalled Juror No. 6's many attempts to explain his views during deliberations, and *none* of the jurors expressed the view that Juror No. 6 was biased. There was, however, considerable frustration on the part of those other jurors that Juror No. 6 did not agree with them on the sufficiency of the evidence.

[6] As in *Symington*, notwithstanding the cause that the trial court believed it possessed to discharge the juror whom it knew to be the one vote for acquittal, it was not justified in *acting* upon that cause because there was a "reasonable possibility" that the request for removal was directly connected to the juror's views on the merits. Following *Brown* and *Symington*, we could reverse on this basis alone.

C

Although the reason offered above is sufficient to require granting the writ on the ground that Juror

No. 6's discharge violated the Sixth Amendment, the trial court's lack of "good cause" for removing the known holdout juror provides an independent reason for reaching the same conclusion. *See Perez*, 119 F.3d at 1426. We therefore hold that, in addition to the *Symington* violation, the trial court's dismissal of Juror No. 6 was unconstitutional on its own terms.

[7] Although refusing to follow the law or refusing to deliberate would be "good cause" for discharging a juror, the trial court expressly disclaimed any finding that Juror No. 6 was guilty of either, and the Court of Appeal affirmed that determination.[18] The only good cause relied upon for dismissal of Juror No. 6 was "actual bias." The court did not find, however, that Juror No. 6 was "biased" in any traditional sense of the term, as would have been the case if, for example, he had stated that he could not be impartial or had accepted a bribe related to the case. Nor did it find that he had "implied bias," such as might have resulted from Juror No. 6 having a connection to one of the parties, or being related to someone who had either committed or been a victim of some similar crime. *Cf. Smith v. Phillips*,

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[18] Specifically, the trial court said, "I'm going to dismiss the juror, but not because he's not deliberating and not because he's not following the law . . . . [I]t's fairly debatable whether he was deliberating or not, so I'm not taking that into account. That is not a basis for dismissal. Not following the law is not a basis for his dismissal either, since there was a request by him to have the law clarified. It was clarified for him." Rejecting Williams's argument that the standard for good-cause dismissals set forth in *Cleveland* had been violated, the Court of Appeal explained that Juror No. 6 was discharged "because he had shown himself to be biased, *not* because he was failing to deliberate or engaging in juror nullification."

455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (discussing possible instances of implied bias); *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc) (holding that a juror who was a victim of multiple crimes and whose husband had been a cellmate of the defendant should have been dismissed as biased).

Rather, the court found that the juror was "biased" for five overlapping reasons: (1) "the fact that he added his own words to the court's instructions as to what the law is," which "indicates where his mind is bent towards and that is biased against the prosecution in the matter"; (2) "his repeating of the severity of the charge in conjunction with his bringing up the subject of juror nullification," which "establishes his state of mind that he's bent in that regard, that he's concerned about the severity of the charge, which means the severity of the punishment"; (3) when the judge "asked him what burden of proof he was relying on, he said it was a [*sic*] very, very convinced beyond a reasonable doubt," which the judge believed to mean "higher than beyond a reasonable doubt because the charge is murder"; (4) the fact that "[h]e also disagrees with the felony murder rule"; and (5) the fact that "[h]e's dishonest to me in stating that no juror including himself had discussed the severity of the charge, had not discussed juror nullification."

Whether that determination amounted to "bias" under the California standard for "actual bias" is neither a question that is before us nor a ground for federal habeas relief. What we must decide instead is whether the bases for discharge relied upon by the trial judge constitute, under the circumstances of this case, "good cause" for removing a known holdout

juror. We conclude that they do not, for several reasons. Absent good cause, removal of the juror violated the Sixth Amendment.

1

[8] We begin with the trial court's determination that Juror No. 6 disagreed with the felony murder rule. Such "disagreement" with the type of crime charged is not the type of bias that can justify removing a juror for good cause mid-deliberations. There is no requirement that jurors *agree* with the law that they are asked to apply, so long as they agree to apply it impartially — which Juror No. 6 did here, according to the trial court. "The defendant's entitlement to jurors impartial on the question of whether he committed the crimes charged is entirely distinct from the question of whether the crime itself is one which arouses their moral passions"; a juror need not be "impartial to the underlying crime itself." *United States v. Johnson*, 990 F.2d 1129, 1133 (9th Cir. 1993). Indeed, even in the capital-punishment context, in which jurors must be specifically *qualified* for their task, impartiality requires only that "jurors . . . follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"; as a result, dismissing jurors who merely harbor doubts about the death penalty is unconstitutional. *Adams v. Texas*, 448 U.S. 38, 45, 50 (1980).

We therefore hold that any disagreement with the law expressed by Juror No. 6, even if it constituted "bias" under California law, was not "good cause" for removing a deliberating juror, absent a finding that he was unwilling to follow the law due to his concerns about it. Indeed, it would be anomalous, as

well as contrary to law, to hold that a juror was "biased" by his general feelings about a law if, as the trial court found here, he was neither unwilling nor unable to follow the law as required.

2

[9] Next, certain of the other trial court findings related to Juror No. 6's "concern" with the "severity of the charge," which the trial court erroneously took to mean that the juror was applying a higher-than-allowed burden of proof. But misstating the law during a mid-deliberation voir dire that should never have taken place cannot provide good cause to dismiss a juror, and the record does not support the finding that Juror No. 6 misstated the law in any event.

Juror No. 6 testified, when questioned by the court, "I can remember saying [during the jury deliberations] this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." That sentiment is not "good cause" for the dismissal of a deliberating juror. First, the juror's statement should never have left the jury room. The court subjected Juror No. 6 to an improper and "broad-ranging judicial inquisition[ ] into [his] thought processes." *Thomas*, 116 F.3d at 623. The court asked, for example, "*In your own personal mind*, do you believe you are using a burden of proof that is based on a charge of first degree murder that is higher than one that would be used for some charge that is less serious than first degree murder?" and then presented Juror No. 6 with a string of questions concerning jury deliberations in other, hypothetical

prosecutions for other crimes. (Emphasis added). This pervasive inquiry violated the "imperative[ ] of preserving jury secrecy." *Symington*, 195 F.3d at 1087.

Second, the court clearly misstated what Juror No. 6 had testified to during the court's inquiry. The juror did not say "very, very convinced beyond a reasonable doubt" "when [the court] asked him what burden of proof he was relying on." His words were actually: "[W]e should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." That is, as Juror No. 6 explained when pressed by the court, "very convinced" as used in his sentence — detached from the actual standard "beyond a reasonable doubt" — simply "means it's a good . . . idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that . . . if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial." The trial court's misstatement of the record made its conclusion unreasonable; Juror No. 6 did not "add[ ] his own words" to create a higher burden of proof when he answered the court's question. *See Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) (applying the more stringent AEDPA standard and explaining that "[a state court's] misapprehension [of the record] can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable").

Third, the court was wrong to derive meaning from the precise words used by the juror to define the government's burden of proof. The beyond-a-reasonable-doubt "standard is an ancient and

honored aspect of our criminal justice system," but "it defies easy explication." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). In the context of evaluating jury instructions, the Court has emphasized that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Holland v. United States*, 348 U.S. 121, 140 (1954) (internal quotation marks omitted), and that "[t]he rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them," *Hopt v. Utah*, 120 U.S. 430, 440-441 (1887). Similarly, the trial court's Socratic questioning of the juror regarding his understanding of the standard was unlikely to produce a clear and perfect response or reflect a precise unanimous understanding of the meaning of the words. Juror No. 6's statement was fully consistent with the jury instructions he had received. Moreover, despite the inquisition as to what standard the juror would actually apply, neither the trial court nor the Court of Appeal concluded that Juror No. 6 would not follow the law. In short, any purported deviation in Juror No. 6's understanding of those instructions did not give rise to good cause sufficient to justify removing a holdout juror.

Finally, it is hardly "bias" to acknowledge the relative "importan[ce]" of a murder trial and to "pay particular attention" to whether the evidence satisfies the required burden of proof. Rather, it is a realistic description of what all dedicated citizens who perform the public duty of serving on juries do: deliberate more intensively and consider the facts and law more thoroughly in the most serious of cases. Indeed, in *Adams* the Supreme Court expressly

disapproved a *voir dire* inquiry that "exclude[d] jurors who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." 448 U.S. at 49. So long as the jury actually applies the requisite burden of proof — which is the same for all crimes — in the end, it has acted appropriately, even if it undertook its task more deliberately and devoted more time to its deliberations before reaching its decision.

What resulted from the court's intrusive inquiry into the juror's reasoning was a suggestion that Juror No. 6 was paying "particular attention to what evidence was presented at the trial," was taking more time than others, and was not yet sure whether the government had satisfied its burden of proof. That he was not convinced was not something that showed his bias, but rather a reflection of his current thinking regarding the issues in the case, a thought process to which the trial court should not even have been exposed.

3

[10] The remainder of the court's second determination — that Juror No. 6 was concerned with the severity of the *punishment*, as opposed to the seriousness of the *offense* charged — was contrary to the record and thus failed to amount to good cause for his dismissal. California courts, like the federal courts, prohibit juries from "discuss[ing] or consider[ing] the subject of penalty or punishment" in cases in which they have no

sentencing responsibility, because the penalty that might result from a guilty verdict does not bear on the factual question of the defendant's guilt. CALJIC 17.42; *see Shannon v. United States*, 512 U.S. 573, 579 (1994). A juror's disregard for such an instruction may in some instances provide good cause to discharge him. But it is plain from the record that Juror No. 6 did not disregard the instruction here, and thus no good cause for his removal existed. *Cf. Taylor*, 366 F.3d at 1001.

According to the jury foreman, when he prepared his note to the trial court to report a juror who had "expressed concern relative to the severity of the charge," he originally wrote "severity of the punishment." He then erased "punishment" and replaced it with "charge," when "there seemed to be a consensus that that word ["punishment"] should be removed." Although the foreman "believe[d] that punishment is part of the issue in this other juror's mind," he did not say that Juror No. 6 had ever mentioned "punishment" and did not otherwise provide a basis for his belief. Indeed, only one juror, Juror No. 5, was even "pretty sure" he recalled the word "penalty" ever being used. When asked directly, none of the other jurors remembered the question of punishment or penalty being raised. To the contrary, a number of them expressly denied that it had, distinguishing between the "charge" and the "penalty" or the "consequences," and explained that only the former had been mentioned.

Faced with this clear "consensus" among the jury and near unanimity, there could not have been good cause to dismiss Juror No. 6 for being "concerned about the severity of the charge, which means the

severity of the punishment," because "they really are interchangeable." Rather, it is clear that the jurors understood the two to be distinct. As noted above, for a juror to say to his peers during deliberations that the case before them is an important one, involving serious *charges*, and that they should apply the beyond a reasonable doubt standard most carefully and deliberately, is not good cause for removal by any means.

4

[11] Finally, the trial court's determination that Juror No. 6 was "lying in court" about what had been discussed during deliberations is directly contradicted by the record. The transcript of Juror No. 6's testimony reveals that he never "stat[ed] that no juror *including himself* had discussed the severity of the charge," as the trial court found. (Emphasis added). To the contrary, when the trial judge recognized the ambiguity of the prosecutor's question, "Has anyone discussed the severity of the charge?" to which Juror No. 6 responded, "No, not that I recall," he then asked, "Just to be clear, have you made reference during deliberations to the severity of the charge?" (Emphasis added). Juror No. 6 then answered that, yes, *he* had talked about the importance of the case. Similarly, Juror No. 6 never "stat[ed] that no juror including himself had discussed . . . juror nullification." Again to the contrary, when asked by the prosecutor whether there was "any discussion about what the judge described as jury nullification," Juror No. 6 responded, "*Yes*, someone . . . raised the question whether juries always convict according to the law, and I can remember I said sometimes they don't,"

and he then mentioned the historical examples of which he was aware. (Emphasis added).

The court's determination is contradicted not only by the record, but also by the court's earlier finding made immediately after Juror No. 6 testified. At that time, the court acknowledged that "actually, he sort of admitted that he had discussed [the severity of the charge]," and then concluded, "he *isn't* lying, but intentionally withheld honest information." (Emphasis added). Nothing in the record, however, indicated that Juror No. 6 had withheld anything, and the court offered no indication of what it thought the juror might have withheld.

We therefore conclude that the court's finding that Juror No. 6 was lying when he responded to the judicial inquiry in court was manifestly erroneous as well, and thus cannot provide good cause for his removal. In so holding, we recognize that credibility determinations fall largely within the purview of the factfinder and can rarely be reversed on direct appellate review, let alone on habeas. Nevertheless, this is not a case in which a credibility determination was based on intangible factors, such as demeanor, or on statements that are not inherently believable, or that conflict with other evidence. Rather, the trial court relied solely upon its recollection of statements made in court by the juror, which statements the juror in fact never made, as the transcript reveals. As "the state courts plainly . . . misstate[d] the record in making their findings," Williams is able to overcome the presumption of correctness bestowed upon them. *Taylor*, 366 F.3d at 1001.

D

For the reasons stated above, none of the elements of the trial court's determinations, individually or collectively, regarding Juror No. 6 serve to establish the "good cause" required by the Sixth Amendment to remove a deliberating juror, particularly one who was neither refusing to follow the law nor unwilling to deliberate. This is a separate reason, independent of the *Symington* violation, to hold that the dismissal of a known holdout juror was unconstitutional. What we are left with, then, are the conclusions (1) that *at least* a reasonable possibility existed that Juror No. 6's discharge stemmed from his disagreement with his peers over their views of the merits of the case, and (2) that there was no good cause to justify the juror's discharge.

Either conclusion standing alone would warrant reversal. Together, the constitutional violation is well beyond doubt. At most, the trial court inartfully identified some inchoate unease it felt about the juror, who was the only one not yet ready to vote to convict. Such unease, however, did not allow the court to discharge Juror No. 6, especially in light of the earlier disclosure of his views of the sufficiency of the evidence. The trial court's action deprived Williams of her constitutional right to a fair trial by jury.

IV. CONCLUSION

A hung jury is never a desirable outcome in a criminal trial. When a mistrial results, the interest shared by the State, the defendant, the court, and the public in the efficient administration of justice is

diminished. The sacrifice of efficiency for the preservation of liberty is central, however, to the safeguards the Constitution affords criminal defendants. If "[m]en must turn square corners when they deal with the Government," it is even more true that the government, including the courts, may not cut corners when dealing with man's freedom. *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). Unfortunately, the trial court cut some corners here. In view of the reasonable possibility that Juror No. 6's discharge was directly or indirectly the result of his position on the merits of the case, and in view of the lack of good cause to justify his dismissal, we hold that the removal of Juror No. 6 deprived Williams of her right to a fair trial by jury. We therefore reverse the judgment of the district court and remand with instructions to grant the writ.

REVERSED and REMANDED.

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ENTERED
Clerk, U.S. District Court
May 31 2007
Central District of California
By Deputy

FILED
Clerk, U.S. District Court
May 30 2007
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TARA SHENEVA WILLIAMS Petitioner, v. GWENDOLYN MITCHELL, Respondent.	CV-03-02691-GW (VBK) **JUDGMENT**

Pursuant to the Order Accepting and Adopting the Report and Recommendation of the United States Magistrate Judge, and dismissing the First Petition for Writ of Habeas Corpus ("Petition") with prejudice,

IT IS ADJUDGED that the First Amended Petition is dismissed with prejudice.

DATED: 5/28/07

/s/ George P. Schiavelli
GEORGE P. SCHIAVELLI
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

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ENTERED
Clerk, U.S. District Court
May 31 2007
Central District of California
By Deputy

FILED
Clerk, U.S. District Court
May 30 2007
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TARA SHENEVA WILLIAMS Petitioner, v. GWENDOLYN MITCHELL, Respondent.	CV-03-02691-GW (VBK) **ORDER (1) ACCEPTING AND ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, AND (2) DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS**

Pursuant to 28 U.S.C. §636, the Court has made a de novo review of the First Amended Petition for Writ of Habeas Corpus ("First Amended Petition"), Respondent's Answer, Petitioner's Traverse, all of the records herein and the Report and Recommendation of the United States Magistrate Judge ("Report").

IT IS ORDERED that: (1) the Court accepts and adopts the Report and Recommendation, and (2) Judgment be entered dismissing the First Amended Petition with prejudice.

DATED: 5/28/07

/s/ George P. Schiavelli
GEORGE P. SCHIAVELLI
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

FILED
Clerk, U.S. District Court
Mar. 19, 2007
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TARA SHENEVA WILLIAMS Petitioner, v. GWENDOLYN MITCHELL, Respondent.	CV-03-02691-GW (VBK) **REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

This report and recommendation is submitted to the Honorable George P. Schiavelli, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

Tara Sheneva Williams (hereinafter referred to as "Petitioner"), a California state prisoner, filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" pursuant to 28 U.S.C. §2254 on April 16, 2003. Respondent filed a motion to dismiss based

upon non-exhaustion on June 13, 2003. By order issued July 24, 2003, the Court granted Petitioner's request for a stay pending exhaustion. Petitioner, represented by counsel, filed a "First Amended Petition" on November 14, 2005, and a "Supplemental memorandum" on January 20, 2006. Respondent filed an "Answer to First Amended Petition and Supplemental Memorandum" ("Answer") on May 17, 2006. Petitioner filed a "Traverse to Answer" ("Traverse") on September 25, 2006.

Briefing having been deemed completed, the matter is ready for decision. Having reviewed the allegations of the First Amended Petition and Supplemental Memorandum, and the matters set forth in the record and the parties' filings, it is recommended that the First Amended Petition be denied and the matter be dismissed with prejudice.

PRIOR PROCEEDINGS

Pursuant to a state jury trial, in September 1999 Petitioner was convicted of first degree murder (California Penal Code §187(a)). The jury found true allegations that the murder was committed while Petitioner "aided and abetted or was a member of a criminal conspiracy in the commission or attempted commission of the crime of robbery" (Cal. Penal Code §190.2(a)(17)), and that a principal was armed with a firearm (Cal. Penal Code § 12022(a)(1)). In November 1999 the trial court sentenced Petitioner to prison for life without the possibility of parole. (Reporter's Transcript ("RT") 1366-69, 1394-95; Clerk's Transcript ("CT") 65-66, 275-77, 310-13).

Petitioner appealed to the California Court of Appeal. By order filed March 27, 2001, the Court of Appeal affirmed the judgment of the trial court. (Respondent's Lodgment no. 3, 4, 15, 16). Petitioner filed a petition for review in the California Supreme Court. By order filed July 11, 2001, the California Supreme Court granted the petition for review and remanded for reconsideration in light of People v. Cleveland, 25 Cal. 4th 466 (2001). (Respondent's lodgment no. 5, 6). On remand the Court of Appeal requested supplemental briefing from the parties. By order filed January 13, 2002, the Court of Appeal again affirmed the judgment of the trial court. (Respondent's Lodgment no. 7, 8, 9, 10). Petitioner filed a petition for review in the California Supreme Court. By order filed April 10, 2002, the California Supreme Court denied the petition for review without comment or citation to authority. (Respondent's Lodgment no. 11, 12).

Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court. By order issued June 23, 2003, the Superior Court denied the habeas petition. (Respondent's Lodgment no. 17, 18).

Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal. By order issued October 14, 2003, the Court of Appeal denied the habeas petition. (Respondent's Lodgment no. 19, 20).

Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. On November 10, 2004, the California Supreme Court denied the habeas petition with the following order: "Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon*

(1953) 41 Cal.2d 756.)" (Respondent's Lodgment no. 21, 22).

FACTUAL SUMMARY

As found by the California Court of Appeal on direct review, the following facts support Petitioner's conviction:

> *Guilt phase – prosecution evidence.*
>
> . . . .
>
> On October 17, 1993, Hung Mun Kim was working alone at his liquor store in Long Beach. Shortly before 4:00 p.m., Schantel W. entered the store and left a few seconds later. [Carde] Taylor then entered the store, followed by Schantel, and they both left a few seconds later. Taylor re-entered the store, pointed a gun at Kim and, in the course of robbing the cash register, shot him twice in the head and killed him. No arrests were made until five years later.
>
> When [Petitioner] was interviewed by police, in December 1998, she initially denied any knowledge of the crime. After listening to a statement Taylor had given police, [Petitioner] said she had been at the scene of the crime, but that she was not involved and didn't know anything about it. Finally, [Petitioner's] story "changed to: I was there. I went there with [Taylor] and Schantel [W.] to case the place to do a robbery. The robbery was not supposed to happen then. It was supposed to happen

that night, and we were just looking to see if it was okay to rob that place."

[Petitioner] said the robbery had come about in the following way. Taylor had damaged [Petitioner's] car and agreed to pay for the repairs. Taylor asked [Petitioner] to drive her around to find a store she could rob. [Petitioner], with her infant son in the car, picked up Taylor and Schantel. She knew that Taylor had a gun with her. They check out two or three stores, looking for one that Taylor could rob after dark. The place they checked right before the liquor store was a video store, which was no good because it closed at 5:00 p.m. [Petitioner] then drove to Kim's liquor store and parked. Taylor and Schantel got out. [Petitioner] heard two gunshots and saw Taylor and Schantel running down the street. [Petitioner] drove over to Taylor and asked what happened. Taylor was hysterical and refused to answer. [Petitioner] drove Taylor and Schantel to the house of Schantel's aunt. [Petitioner] claimed there had never been a plan to rob the store during daylight hours.

[Petitioner] and Taylor had committed a previous robbery in Culver City. In that robbery, [Petitioner] was the driver and Taylor was the robber. They had looked at 10 or 20 different stores before picking out one to rob. After the Culver City robber, [Petitioner] and Taylor had a falling out. [Petitioner] said she broke off a sexual

relationship they had been having, and Taylor was so upset she kidnapped [Petitioner's] son just to get Williams to pay attention to her. The only reason they got together for the liquor store robbery was so that Taylor could pay for the damage to [Petitioner's] car. [Petitioner] wanted Schantel present because Taylor was dangerous.

. . . .

Guilt phase – defense evidence.

. . . .

[Petitioner] did not present any witnesses.

(Respondent's Lodgment no. 10 at 2-4, 6).

PETITIONER'S CONTENTIONS

Petitioner contends the following:

1. The trial court erred when it dismissed juror number six (Ground One);

2. The trial court erred when it responded to the jury's question about California Jury Instructions Criminal ("CALJIC") 6.10.5 (Ground Two).

(Amended Petition at 5, attachment at 39; Supplemental Memorandum at 2-3).

DISCUSSION

I

STANDARD OF REVIEW

This case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Koerner v. Grigas, 328 F.3d 1039, 1044 (9th Cir. 2003). As explained by the Supreme Court, the AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412 (2000); see also Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners.").

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

Section "2254 (d) (1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning." Bell v. Cone, 535 685, 694 (2002). The Supreme Court has explained that

> [u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

William v. Taylor, 529 U.S. at 412-13; Brown v. Payton, 544 U.S. 133, 140-41 (2005); Lockyer v. Andrade, 538 U.S. 63, 74-75 (2003); see Weighall v. Middle, 215 F.3d 1058, 1061 (9th Cir. 2000) (discussing Williams).

While Supreme Court precedent is the only authority that is controlling under the AEDPA, this Court may look to Ninth Circuit case law as persuasive authority "for purposes of determining whether a particular state court decision is an unreasonable application of Supreme Court law." Vlasak v. Superior Court of California ex rel. County of Los Angeles, 329 F.3d 683, 687 (9th Cir. 2003) (quoting Luna v. Cambra, 306 F.3d 954, 960 (9th Cir.) (internal quotation marks and citation omitted), amended by 311 F.3d 928 (9th Cir. 2002)).

Further, the AEDPA provides that state court findings of fact are presumed to be correct unless Petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. §2254(e) (1).

Finally, the AEDPA "does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under §2254(d)(1) – whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law." Lockyer v. Andrade, 538 U.S. at 71.

II

PETITIONER IS NOT ENTITLED TO HABEAS RELIEF ON HER CLAIM THAT THE TRIAL COURT ERRED BY DISMISSING JUROR NUMBER SIX

In Ground One Petitioner contends that the trial judge erred when he dismissed juror number six ("Juror 6"). Petitioner argues that it was violative of her rights under state and federal law to discharge the "lone holdout juror" during deliberations. (Amended Petition at 5, attachment at 13-50; Supplemental Memorandum at 1-2).

To the extent Petitioner raises issues of state law in Ground One, these issues must be rejected as not cognizable in federal habeas corpus proceedings. Absent some constitutional violation, a violation of state law does not provide a basis for federal habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

In California, the discharge and substitution of jurors is governed by Penal Code §1089. The statute provides, in relevant part, as follows:

> If any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror

> requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

(Cal. Penal Code §1089).

The Sixth Amendment affords criminal defendants the right to trial by an impartial jury. The right to a jury trial applies to state criminal trials through the Due Process Clause of the Fourteenth Amendment. See Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968). This Sixth Amendment right encompasses claims regarding the discharge of trial jurors. The California statute governing discharge and substitution of jurors (Penal Code §1089) has been upheld as facially constitutional. See Miller v. Stagner, 757 F.2d 988, 995 (9th Cir.), amended by 768 F.2d 1090 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986). A habeas petitioner may raise a Sixth Amendment challenge to the trial court's discharge and substitution of a particular juror on the grounds that there was not good cause for it. See Perez v. Marshall, 119 F.3d 1422, 1426 (9th Cir. 1997), cert. denied, 522 U.S. 1096 (1998).[1] "[O]n habeas review, a trial court's findings regarding juror fitness are entitled to special deference." Id. The trial court's knowledge that the

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[1] Petitioner's reliance upon United States v. Symington, 195 F.3d 1980 (9th Cir. 1999), is misplaced. That case "based its analysis [of juror dismissal] on Federal Rule of Criminal Procedure 23 (b) . . . ." Brewer v. Hall, 378 F.3d 952, 957 (9th Cir.) cert. denied, 543 U.S. 1037 (2004); see also United States v. Symington, 195 F.3d at 1086 n.3.

discharged juror was the sole holdout for acquittal does not in itself invalidate the decision to discharge the juror. See id. at 1427.

Here, the record reflects that approximately 1 1/2 days after the commencement of deliberations, the jury foreman consulted with the other jurors and sent out to the judge a written question about CALJIC 6.10.5 and a written note complaining about Juror 6's behavior. The note stated, "Relative to jury instruction 17.41 I wish to inform you that we have one juror who: (1) has expressed an intention to disregard the law (instruction 6.10.5, line 1 and 2) and (2) has expressed concern relative to the severity of the charge (first degree murder)."[2] (CT 202, 207-09; RT 1201-02, 1239, 1244-47). The judge responded by consulting counsel, answering the jury's question about CALJIC 6.10.5, briefly questioning the jury foreman (Juror 8) about the note outside the presence of the other jurors, and then directing the jury to resume its afternoon deliberations. The following

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[2] As administered to the jury, CALJIC 17.14.1 provided as follows,

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

(CT 267). The first two lines of CALJIC 6.10.5 referenced by the jury's note to the judge - - "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of robbery" - - were part of the definition of conspiracy. (CT 244).

morning the prosecutor filed a motion requesting additional questioning of jury members and discharge of Juror 6 for bias. The judge held a hearing at which all twelve jurors were questioned individually outside the presence of their peers, and entertained argument from counsel. The judge concluded that Juror 6 was biased, had been dishonest during questioning in court, and should be discharged and replaced with an alternate juror. (CT 203-06, 209-11; RT 1246-52, 1257-1363). As summarized by the Court of Appeal,

> The evidentiary hearing supported the trial court's finding of bias. According to most of the jurors, Juror No. 6 had either explicitly said he would not follow the law or he had implied as much. He apparently rejected the notion that, because of vicarious liability principles, [Petitioner] and Taylor might be guilty of the same crime. The trial court was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest.

(Respondent's Lodgment no. 10 at 16-17).

Contrary to Petitioner's contention, the discharge of Juror 6 under the circumstances of this case did not constitute a constitutional violation. The record amply supports the trial judge's determination that good cause existed for the discharge of Juror 6. (RT 1265-1356). Habeas relief is not warranted on Ground One.

III

PETITIONER IS NOT ENTITLED TO HABEAS RELIEF ON HER CLAIM THAT THE TRIAL COURT ERRED BY RESPONDING TO THE JURY'S QUESTION

In Ground Two Petitioner contends that the trial judge erred when he responded to the written question about CALJIC 6.10.5 that the jury sent out during deliberations. Petitioner argues that the trial judge's response was inaccurate and confusing. (Supplemental Memorandum at 2-10).

Procedural Bar

Respondent contends that Ground Two is procedurally barred because the California Supreme Court denied the petition in which it was presented with the following order: "Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756.)" (Respondent's lodgment no. 21, 22; Answer at 26-31). Petitioner disputes this contention. (Travers at 12-17).

The procedural default doctrine forecloses federal review of a state prisoner's federal claims if those claims were defaulted in state court pursuant to an independent and adequate state law ground. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). To find procedural default, a federal court must determine that the state court explicitly invoked a state procedural bar as an independent basis for its decision, id. at 735, McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995), and that the state procedural bar cited was clear, consistently applied,

and well-established at the time of the petitioner's purported default. See Calderon v. U.S. Dist. Court for Eastern Dist. Of California (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996), cert. denied, 520 U.S. 1204 (1997).

The Ninth Circuit has adopted a burden-shifting analysis to determine the adequacy of a state procedural bar. Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir.), cert. denied, 540 U.S. 938 (2003). Under this analysis, the state may plead, as an affirmative defense, that the petitioner's failure to satisfy a state procedural bar should foreclose federal review. Id. Once the state pleads the bar, the burden shifts to the petitioner to challenge the adequacy of that bar by showing, for example, that it has been inconsistently applied. Id. The state has the ultimate burden of proving adequacy. Id.

To preclude federal review in this circuit, a state court's order must specify which procedural rule applies to which claim. See Calderon v. U.S. Dist. Court for Eastern Dist. of California (Bean), 96 F.3d at 1131 (finding California Supreme Court order that did not specify which of 39 claims was barred by which of several state procedural rules cited was ambiguous and therefore insufficient to preclude federal review); see also Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996) ("a procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review"); Washington v. Cambra, 208 F.3d 832 (9th Cir.) (where the state court invokes multiple rules without stating which applies to which of multiple claims, all rules must be adequate and independent), cert. denied, 531 U.S. 919 (2000).

The habeas petition which Petitioner submitted to the California Supreme Court contained numerous claims. (Respondent's lodgment no. 21). The California Supreme Court's order is an ambiguous order that does not specify which state procedural rule applies to which claim. Respondent acknowledges that a citation to In re Waltreus does not bar federal review. (Answer at 30). Federal habeas corpus review is not foreclosed.

Merits

To the extent Petitioner intends to raise issues of state law in Ground Two, these issues must be rejected as not cognizable in federal habeas corpus proceedings. Absent some constitutional violation, a violation of state law does not provide a basis for federal habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

When a federal court reviews instructions to the jury, the question is whether the challenged instruction by itself so infected the entire trial that the trial can be deemed fundamentally unfair in violation of the petitioner's due process rights. See Estelle v. McGuire, 502 U.S. at 72-73. A due process violation can occur as a result of a judge's response to a jury's inquiry. See Beardslee v. Woodford, 358 F.3d 560, 574-75 (9th Cir.) (harmless due process violation occurred when, in responding to request for clarification, judge refused to give clarification and informed jury that no clarifying instructions could be given), cert. denied, 543 U.S. 842 (2004). A judge should respond to a jury's request for clarification with sufficient specificity to eliminate the jury's confusion. Id. An elaborate response is not a necessity; a judge responding to a jury's question may satisfy constitutional requirements by directing

the jury to specific portions of the original, constitutionally adequate instructions which answer the question. Weeks v. Angelone, 528 U.S. 225, 234 (2000). Just as a jury is presumed to follow its instructions, it is presumed to understand a judge's response to its inquiry. Id.

Petitioner was prosecuted for felony-murder under the theory that she acted as either a co-conspirator or an aider-and-abettor in the robbery during which the victim was killed. Accordingly, the jury was instructed on the principles of conspiracy and aiding and abetting. (RT 966-67, 977; CT 237-39, 244-56). The jury's question pertained to CALJIC 6.10.5, an instruction designed for use when conspiracy is not charged as an offense, but evidence of conspiracy is used at trial to prove criminal liability for acts of a co-conspirator. As administered to the jury, CALJIC 6.10.5 provided as follows:

> A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of robbery, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case.
>
> In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant

> personally committed the overt act, if she was one of the conspirators when the alleged overt act was committed.
>
> The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.
>
> To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or unlawful act.

(CALJIC 6.10.5; CT 244).

The record reflects that during deliberations the jury sent out a written question on a preprinted form. Following the preprinted statement, "We, the jury in the above entitled action, request the following," the foreman wrote, "Is it legally permissible for a juror to interpret page 32 of the jury instructions [CALJIC 6.10.5] to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future?"[3] (CT 208-09; RT 1247). The judge held a hearing to discuss the matter with counsel. Defense counsel argued that the answer should be yes, while the prosecutor maintained that it should be no. The

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[3] This question was sent out by the jury at the same time it sent out its note complaining about the behavior of Juror 6. (CT 207-09-; RT 1246-47.)

judge responded to the jury's inquiry by calling the jury and alternates into the courtroom, reading aloud the jury's question, and stating, "The answer is no." (CT 209; RT 1246-49, 1252-56). The following day Juror 6 was discharged an alternate juror was selected to replace him. The judge instructed the reconstituted jury to begin deliberations anew. Deliberations were conducted without additional inquiries from the jury. After approximately four hours of deliberations the jury returned its verdict. (CT 209-11, 276-77; RT 1250, 1252, 1359-66).

Under California law, the crime of conspiracy is defined as two or more persons conspiring to commit any crime, together with proof of the commission of a overt act by one or more of the parties to such an agreement in furtherance thereof. People v. Vargas, 91 Cal.App.4th 506, 551 (2001); Cal. Penal Code §182. The specific intent required has two parts: "(a) the intent to agree, or conspire; and (b) the intent to commit the offense which is the object of the conspiracy." Id. (citation omitted). In other words, it must be shown "not only that the conspirators intended to agree but also that they intended to commit the elements of that offense." Id. (citation and italics omitted). It need not be shown that the conspirators agreed to target a particular victim. "[I]t is not necessary . . . to show that the criminal enterprise in its inception had in contemplation a particular crime as against a particular person. . . ." People v. Jordan, 24 Cal.App.2d 39, 50 (1937). For example, a defendant may be convicted of conspiracy to commit assault with a firearm even though the police stopped him and his co-conspirators before the gun was used or a target was selected. People v. Muniz, 16 Cal.App.4th 1083, 1086-88 (1993) (defendant preparing with fellow gang members for a

drive-by shooting was convicted of conspiracy to commit assault with a firearm even though "[t]hey had no particular victim in mind").

Contrary to Petitioner's contention, the trial judge's response to the jury's question did not violate her constitutional right to due process. The trial judge's response correctly expressed state law and directly answered the jury's question. After receiving the trial judge's response to its inquiry the jury deliberated for several hours without posing additional questions, and then returned its verdict. "This particular jury demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge's responses unsatisfactory." Weeks v. Angelone, 528 U.S. 225, 235-36 (2000). Habeas relief is not warranted on Ground Two.

RECOMMENDATION

For the foregoing reasons, **IT IS RECOMMENDED** that the District Court issue an order: (1) accepting and adopting this Report and Recommendation, and (2) directing that Judgment be entered denying and dismissing the First Amended Petition with prejudice.

DATED: 3/19/2007

/s/ Victor B. Kenton
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules governing the duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

Supreme Court
FILED
Nov. 10, 2004
Fredrick K. Ohlrich Clerk

Deputy

S122165

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re TARA SHENEVA WILLIAMS on Habeas Corpus

Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756.)

/s/ George
Chief Justice

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Court of Appeal – Second Dist.
FILED
Oct. 14, 2003
Joseph A. Lane Clerk
M. Gavinski, Deputy Clerk

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re TARA SHENEVA WILLIAMS, on Habeas Corpus.	B170245 (Los Angeles County Super. Ct. No. NA039425) (Richard R. Romero, Judge) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

THE COURT, having read and considered Williams's petition for writ of habeas corpus filed September 26, 2003, hereby denies the petition.

Two of the claims advanced by Williams, the sufficiency of the evidence to support the special circumstance allegation and the propriety of the discharge of juror no. 6, were raised and rejected on appeal in case no. B137365. These claims cannot be raised again in a writ petition. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Williams also claims the trial court had a sua sponte duty to instruct the jury on the lesser included offense of being an accessory after the fact, the trial court erroneously allowed the case to go to the jury on a felony murder theory, trial court erroneously instructed the jury in the words of CALJIC Nos. 2.03, 2.52, 2.70, 6.10.5, 6.11, 8.26, 8.80.1, 8.81.17 and the trial court erroneously construed CALJIC No. 6.10.5.

None of these claims have merit. The offense of accessory to murder is not a lesser offense included within murder (*People v. Majors* (1998) 18 Cal.4th 385, 408), the case properly went to the jury on a felony murder theory and the instructional claims all could have been, but were not, raised on appeal (*People v. Clark* (1993) 5 Cal.4th 750, 765-766).

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date Printed: 07/09/03

Case No. NA039425

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEFENDANT 01: TARA SHENEVA WILLIAMS

Information filed on 05/06/99.

Count 01: 187(a) PC Fel – Murder.

On 06/23/03 at 830 AM in L.A. Superior Court – South Dept SOE

Case called for miscellaneous

Parties:	Richard R. Romero (Judge)	Diane Moore (Clerk)
	None (Rep)	None (DDA)

Defendant is not present in court, and not represented by counsel

Petition for writ of habeas corpus:
The Court has read and considered defendant's petition for writ of habeas corpus. Those issues are for direct appeal not collateral attack.

The petition is denied.
Defendant is notified via U.A. Mail

Next scheduled event:
Proceedings terminated

Miscellaneous
Page No. 1 Hearing Date: 06/23/03

Supreme Court
FILED
Apr 10, 2002
Fredrick K. Ohlrich Clerk

Deputy

Court of Appeal, Second Appellate District, Division Three – No. 137365

S104661

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CARDE KEISHON TAYLOR et al., Defendants and Appellants.

Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.

George, C.J., was absent and did not participate.

/s/ BAXTER
Acting Chief Justice

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Court of Appeal – Second Dist.
FILED
Jan. 18, 2002
Joseph A. Lane Clerk
_____Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARDE KEISHON TAYLOR and TARA S. WILLIAMS, Defendants and Appellants.	B137365 (Super. Ct. No. NA039425)

APPEALS from judgments of the Superior Court of Los Angeles County, William T. Garner, as to Taylor, and Richard R. Romero, as to Williams, Judges. As to Taylor, the judgment is affirmed in part, reversed in part, and remanded. As to Williams, the judgment is affirmed.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant Carde Keishon Taylor.

Bruce Daniel Rosen, under appointment by the Court of Appeal, for Defendant and Appellant Tara S. Williams.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Jennevee H. De Guzman, Deputy Attorney General, for Plaintiff and Respondent.

Defendants and appellants, Carde Keishon Taylor and Tara S. Williams, appeal from the judgments entered following their convictions in two separate jury trials, for special circumstances murder (during the commission of a robbery), with principal armed and firearm use enhancements (Pen. Code, §§ 187/190.2, subd. (a)(17), 12022, 12022.5).[1] [2] Sentenced to state prison terms of life without possibility of parole plus five years (Taylor), and life without possibility of parole (Williams), the defendants contend there was trial and sentencing error.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Appellants were originally charged together in the same information with the enumerated crimes, identified by LASC No. NA039425. Thereafter, separate trials were had. However, when the cases came up on appeal, each record was identified by the same Los Angeles Superior Court number. A defacto consolidation for purposes of appeal thereafter occurred without opposition. Thus, the Attorney General responded to each appellant's separate briefs with a single respondent's brief. This court has prepared one opinion dealing with both cases, careful to present the facts and arguments and law separately to each appellant.

The judgment is affirmed in part, reversed in part, and remanded as to Taylor. The judgment is affirmed as to Williams.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Guilt phase-prosecution evidence.*

a. *Evidence presented at both trials.*

On October 17, 1993, Hung Mun Kim was working alone at his liquor store in Long Beach. Shortly before 4:00 p.m., Schantel W. entered the store and left a few seconds later. Defendant Taylor then entered the store, followed by Schantel, and they both left a few seconds later. Taylor re-entered the store, pointed a gun at Kim and, in the course of robbing the cash register, shot him twice in the head and killed him. No arrests were made until five years later.

b. *Evidence presented at Williams's trial.*

When Defendant Williams was interviewed by police, in December 1998, she initially denied any knowledge of the crime. After listening to a statement Taylor had given police, Williams said she had been at the scene of the crime, but that she was not involved and didn't know anything about it. Finally, Williams's story "changed to: I was there. I went there with [Taylor] and Schantel [W.] to case the place to do a robbery. The robbery was not supposed to happen then. It was supposed to happen

that night, and we were just looking to see if it was okay to rob that place."

Williams said the robbery had come about in the following way. Taylor had damaged Williams's car and agreed to pay for the repairs. Taylor asked Williams to drive her around to find a store she could rob. Williams, with her infant son in the car, picked up Taylor and Schantel. She knew that Taylor had a gun with her. They checked out two or three stores, looking for one that Taylor could rob after dark. The place they checked right before the liquor store was a video store, which was no good because it closed at 5:00 p.m. Williams then drove to Kim's liquor store and parked. Taylor and Schantel got out. Williams heard two gunshots and saw Taylor and Schantel running down the street. Williams drove over to Taylor and asked what happened. Taylor was hysterical and refused to answer. Williams drove Taylor and Schantel to the house of Schantel's aunt. Williams claimed there had never been a plan to rob the store during daylight hours.

Williams and Taylor had committed a previous robbery in Culver City. In that robbery, Williams was the driver and Taylor was the robber. They had looked at 10 or 20 different stores before picking out one to rob. After the Culver City robbery, Williams and Taylor had a falling out. Williams said she broke off a sexual relationship they had been having, and Taylor was so upset she kidnapped Williams's son just to get Williams to pay attention to her. The only reason they got together for the liquor store robbery was so that Taylor could pay for the damage to Williams's car. Williams wanted Schantel present because Taylor was dangerous.

c. *Evidence presented at Taylor's trial.*

When she was initially questioned by police, Taylor denied any knowledge of or involvement in the robbery-murder and claimed she had never been to Long Beach. Shown pictures of herself taken by a surveillance camera in the liquor store, Taylor denied the pictures were of her. She said she had been working for the Job Corps in Utah on October 17, 1993. According to the Job Corps, however, Taylor didn't begin working there until November 30.

Taylor then changed her story and gave the following statement. She and Williams had been having an affair. At the same time, Williams was involved with Taylor's cousin. When the cousin learned of the affair, he threatened to kill Taylor, so she was forced to move out of the house she had been sharing with Williams. She also bought a weapon for protection. Williams and Schantel called Taylor on the morning of the robbery, saying Schantel needed rent money. They came over in the afternoon and asked if Taylor wanted to participate in a robbery. Taylor said she didn't care. When they left, Taylor didn't bring her gun along because she didn't think they were planning to do the robbery right then. But Williams asked if Taylor had her gun with her, and they went back to get it. Williams's son was also in the car. Williams drove to Long Beach. Because Taylor was dressed for a party, she and Schantel exchanged clothing. Williams first stopped at a storage business. Taylor went in and concluded it wasn't a good place to rob. Williams drove around Long Beach some more and found a market. Taylor said the market wasn't a good place to rob because there were too many people inside. They continued

driving, found a third store, and Taylor again said it was no good for a robbery.

Williams was getting frustrated. They stopped at Kim's liquor store. Schantel went in and, when she returned to the car, she said this was a good place to rob. She explained the layout of the store. Taylor entered the store. She went up to the counter, pulled out the gun, and demanded money. She had a bag with her to put the money in. Kim opened the cash register. Taylor ordered him to get on the ground and she grabbed some money. Kim got on the ground, but he suddenly grabbed Taylor's leg. She fell and the gun accidentally went off. She continued to struggle with Kim, and the gun accidentally fired again. Kim screamed and Taylor ran out of the store. Williams drove her to a friend's apartment. When Williams asked how much she had gotten from the cash register, Taylor said $6.00 and food stamps. Williams was upset.

Taylor said she had been involved in five or six prior armed robberies with Williams, and two prior robberies with Schantel.

2. *Guilt phase-defense evidence.*

a. *Williams.*

Williams did not present any witnesses.

b. *Taylor.*

Dr. Kaushal Sharma had interviewed Taylor and reviewed various documents. Sharma testified he could not find evidence of any mental disease or disorder. Taylor told Sharma that she believed it

was morally and legally wrong to commit robbery, that she had been afraid of being caught, but that she had committed the robberies just to please Williams. Taylor denied having had auditory hallucinations at the time of committing these robberies, although she said she had experienced hallucinations before that time. Sharma testified that various aspects of Taylor's behavior during the liquor store robbery – going into the store with a loaded gun and a bag to put stolen money in, ordering Kim to the ground, putting money in the bag, shooting Kim and then putting more money in the bag – showed an awareness of her surroundings and were consistent with the formation of intent.

Dr. Samuel Miles had interviewed Taylor and reviewed various documents, including records from the Department of Children and Family Services (DCFS). Taylor's symptoms included depression, sleep disturbance, appetite disturbance, low self-esteem, hallucinations, and self-destructive thoughts. At the time of the robbery-murder, Taylor "was in a position where she had the qualities that were found by the military psychiatrists during the Korean War to be connected with brainwashing. She was in a situation where she was debilitated, where she was highly dependent upon someone, and where she had felt dread. [¶] Studies of the prisoners of war during [the] Korean War found that those three factors, when put together, would constitute brainwashing. Under those three conditions together, the soldiers were liable to be under the undue influence of others. [¶] And Miss Taylor at that time. . . had those three factors operating." Someone in this condition would be apt to do something she had been told to do, even if she didn't want to do it.

3. *Sanity phase.*

a. *Defense evidence.*

Dr. Miles testified he had gleaned the following facts from the DCFS records: when Taylor was 11 or 12 her stepfather would hit her with his fist or a stick; DCFS found the home an unfit place for minors and Taylor was put into foster care; when Taylor was 14 or so she was seeing a psychiatrist and complaining of hallucinations. Miles opined that Taylor was currently suffering from "a chronic psychiatric illness," either "a major depression with psychotic features or a schizo-affective disorder."

Taylor testified at the sanity phase. She had been 17 at the time of the robbery-murder. When she was 11 or 12, her mother's alcoholic boyfriend would beat her, so her father placed her in foster care. By the age of 14, she had been returned to her mother and stepfather, but the home environment had not changed. At age 15, she was hearing voices and seeing things. A psychiatrist prescribed valium and tryvil. The medication helped calm her, but by that time she had already begun to drink alcohol and smoke marijuana. At some point, Taylor moved in with her grandmother and her cousin. When her cousin went to jail, he encouraged defendant Williams to move in with his grandmother. Williams and Taylor began a sexual relationship. When her cousin got out of jail, he told Taylor to end the relationship. Taylor moved out and eventually got her own place. Williams often visited Taylor without her cousin's knowledge. Taylor stopped taking the prescription medication. Instead, she drank alcohol,

smoked marijuana, and bought valium on the street to calm her nerves.

Shortly after moving into her own apartment, Taylor began committing robberies. Williams would come over and complain about money. One night, Williams told her that her cousin had a gun and was going to kill her. At Williams's urging, Taylor bought a gun. The robberies were Williams's idea. Williams always accompanied Taylor and decided which places to rob. Taylor didn't keep any of the money from the robberies; she gave it all to Williams. The purpose of the liquor store robbery had been to get rent money for Schantel. Taylor had not wanted to commit any of the robberies because she was scared; she only took part because of Williams.

Dr. Miles testified Taylor's childhood and background affected her relationship with Williams. Taylor needed a parental figure, which Williams provided. "[Taylor] was longing for a connection to anybody who she could feel close to. And she was at that point very susceptible to the influence of Miss Williams." Someone in Taylor's situation would have felt good about the relationship and would have overlooked its abusive or exploitative aspects. For someone with Taylor's level of maturity – she "was not a normal mid-adolescent because of her background" – "the sense of what's right comes from the person that you're most connected to." On cross-examination, Miles conceded he had told the prosecutor he didn't think Taylor had been insane when she robbed the liquor store. On redirect examination, Miles opined that at the time of the crime Taylor had been under Williams's influence, in a type of brainwashing relationship, and that she

was unlikely to refuse to do something Williams wanted.

b. *Prosecution evidence.*

Dr. Sharma testified he saw no direct connection between the abuse Taylor had suffered as a child and the robbery-murder. Based on Taylor's behavior during the crime and on his interview with her, Sharma concluded Taylor had been legally sane when she committed the crime.

WILLIAMS'S CONTENTIONS

1. The trial court erred by discharging a juror during deliberations.

2. There was insufficient evidence to support the special circumstance finding.

TAYLOR'S CONTENTIONS

3. The trial court improperly prevented expert witnesses from discussing the basis for their opinions.

4. CALJIC No. 2.62 should not have been given during the sanity phase.

5. The trial court erred by failing to instruct on the defense of unconsciousness.

6. The trial court erred by misinstructing on specific intent.

7. The case must be remanded for resentencing.

DISCUSSION

1. *Discharge of juror.*

Williams contends the trial court erred by discharging one of the jurors during deliberations. This claim is meritless.

After receiving a jury note saying that one of the jurors had "expressed an intention to disregard the law" and "expressed concern relative to the severity of the charge" of "first degree murder," the trial court held an evidentiary hearing regarding the possibility of juror misconduct.

The jury foreperson said Juror No. 6 had "expressed to us, in effect, that first degree murder is a severe charge and that that has an influence on the way he interprets the evidence and the standard he uses for doubt." On the first day of deliberations, Juror No. 6 had "brought up the subject that in the past, in history, there have been occasions when juries have refused to follow the law; for example, in early pre-Civil War times, there have been juries that refused to convict people for harboring fugitive slaves, and there was a later incident he cited . . . in which people had refused to find people guilty of burning draft cards, and he might have had one other example, so I believe that there is, in the back of his mind, a belief . . . that that is a civic responsibility to – there's a name for this – civil disobedience. There's a responsibility to be disobedient in that case. [¶] However, yesterday, I asked him explicitly if that's what was going on here, and he answered no, it wasn't." The foreperson said there had been a "fairly clear statement on [Juror No. 6's] part that connects the severity of the charge with – explicitly of first

degree murder with his need for a higher standard." Juror No. 6 had "coupled [his higher standard of proof] with the severity of [the] first degree murder charge."

The trial court expressed concern that Juror No. 6 might be improperly linking the burden of proof to the severity of the charged offense: "[I]f a juror is basing [a] decision on the seriousness of the offense[,] saying first degree murder is a serious crime and bases burden of proof on the seriousness of the crime, then an argument can be made that they're relying on an illegal burden of proof." Juror No. 6 was brought into the courtroom. The trial court asked, "[H]as any juror, including yourself, indicated that they are motivated at all by the issue of possible punishment in this case, if there were a conviction on the charge?" Juror No. 6 replied, "No, I never even heard the word 'punishment' used." He denied using a higher burden of proof because the charge was first degree murder. He said "jurors should not use juror nullification. They should base their decisions on the evidence that was presented at a particular trial and only on that evidence." He denied that anyone in the jury room had discussed the severity of the charge or indicated an unwillingness to follow the law. The trial court asked, "Just to be clear, have you made reference during deliberations to the severity of the charge?" Juror No. 6 replied: "No, I – Well, let me amend that. [¶] I . . . can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt. Other than that, I did not make a reference to the severity of the case – severity of the charge." Juror No. 6 explained that, to him, "convinced beyond a reasonable doubt" and "very

convinced beyond a reasonable doubt" were the same standard; that "very convinced" "just means it's a good . . . idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced – if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at trial." Asked again if there had been any discussion of jury nullification, Juror No. 6 said another juror had "raised the question whether juries always convict according to the law" and that he had answered, "sometimes they don't. [¶] I know of cases in the Vietnam War era where people did not convict people who were clearly in violation of law. [¶] I also know that in the 19th century the fugitive slave law was not always enforced, became impossible to enforce, because juries would not convict people who were clearly in violation of it."

After Juror No. 6 left the courtroom, the trial court commented: "I am inclined to rule that the juror has engaged in misconduct. He's applying a higher burden of proof than the law requires . . . and that he isn't lying, but intentionally withheld honest information. [¶] When asked whether any juror had discussed juror nullification and had discussed the seriousness of the offense, he initially said no to both of those quite clearly and [then] contradicted himself and admitted that he in fact had responded to a juror's question about jurors not following the law, . . . but I'll allow a fuller record so [defense counsel] may inquire as to the other jurors." The remaining jurors were then questioned.

Juror No. 1 said Juror No. 6 had discussed the seriousness of the charge, but he had not said that,

because of the severity he was applying a standard higher than beyond a reasonable doubt. Juror No. 6 had initiated a discussion about historical instances of jury nullification, but he had not expressed an intent to nullify in this case.

Juror No. 2 said Juror No. 6 had expressed an unwillingness to follow the law and didn't think Williams should be facing the same penalty as her codefendant because she had not been involved in the shooting. The following discussion ensued:

"[DEFENSE COUNSEL]: [D]id he say . . . I understand this is what the law is, I'm not going to follow it, or was he saying my interpretation of the law is that it doesn't apply here?

"JUROR NO. 2: At one time, he probably said your first statement. Then, at other times, he said your second statement. It was both, really.

"[DEFENSE COUNSEL]: When you say probably, is that . . . the take that you have on it or did you –

"JUROR NO. 2: No, he said that.

"[DEFENSE COUNSEL]: He said, 'I'm not going to follow the law'?

"JUROR NO. 2: Oh, he went into some farfetched explanation of how people during the Vietnam War burned their draft cards because they didn't approve of whatever the law was and this was his proper test."

Juror No. 3 said Juror No. 6 had discussed the severity of the charge, said he believed "it was too severe a charge for what he thought was done," and said he understood what the law was but that he was refusing to follow it. Juror No. 6 had said he was going to use a standard other than beyond a reasonable doubt.

Juror No. 4 said Juror No. 6 was reading the law "differently than the rest of the jurors are," but had not indicated he would disregard the law.

Juror No. 5 said Juror No. 6 had expressed an unwillingness to follow the law, had applied a standard different than beyond a reasonable doubt, and had discussed the issue of penalty. Juror No. 6 had said he knew what the law meant but he wasn't going to follow it, and that there was "no way [he] could come to a decision with that kind of penalty for that kind of charge." Juror No. 6 felt that "you can't charge somebody for something they didn't do if they weren't there at the time." Juror No. 6 was applying a standard of "[p]ositive, without any doubt."

Juror No. 7 said one juror had indicated an unwillingness to follow the law, had discussed the severity of the charge, and had brought up jury nullification. From what this juror said, Juror No. 7 got the impression "he felt that if he didn't believe the law, then he was willing to hang the jury," and "that he wasn't willing to follow the law."

Juror No. 9 said Juror No. 6 did not have an open mind, understood the law but didn't like it, and was refusing to follow it.

Juror No. 10 said Juror No. 6 had expressed an unwillingness to follow the law and was applying a higher standard than beyond a reasonable doubt. Juror No. 6 had said he understood what the law meant, but he wasn't going to follow it.

Juror No. 11 agreed that Juror No. 6 was using a standard of "proof beyond all doubt." Juror No. 6 had discussed jury nullification, but he had not expressly said he was going to engage in it. Asked if the issue of punishment was discussed, Juror No. 11 said, "Not punishment, but the charge," and that Juror No. 6 had said "something like for me to be able to convict someone of a charge of murder, you know, whatever, it was always the charge kept coming into play, even when we were trying to discuss just the robbery. He would always go back to say . . . but, you know, the charge of murder."

Juror No. 12 said Juror No. 6 had been merely interpreting the law differently than the other jurors, and that he was not being influenced by the severity of the charge. Juror No. 6 seemed to be using an 'absolute proof' or a 'no doubt' standard, but this perception may have been caused by how Juror No. 12 viewed the evidence.

Following these juror examinations, and argument by counsel, the trial court said: "I'm going to dismiss [Juror No. 6], but not because he's not deliberating and not because he's not following the law." Rather, "[h]e is dismissed without any question in my mind as a biased juror. His bias is shown in a number of ways, by the fact that he added his own words to the court's instructions as to what the law is. That indicates where his mind is bent towards

and that is biased against the prosecution in the matter. [¶] His repeating of the severity of the charge in conjunction with his bringing up the subject of juror nullification establishes his state of mind . . . , that he's concerned about the severity of the charge, which means the severity of the punishment. They really are interchangeable in this context. [¶] When he talks about evidence and the severity of the charge and burden of proof. When I asked him what burden of proof he was relying on, he said it was a very, very convinced beyond a reasonable doubt. [¶] Clearly, from the evidence presented here . . . it's higher than beyond a reasonable doubt because the charge is murder. [¶] He also disagrees with the felony murder rule. That's clear from the juror's response. [¶] He's dishonest to me in stating that no juror including himself had discussed the severity of the charge, had not discussed jury nullification. [¶] . . . [H]e was dishonest in court. [¶] And . . . in my opinion, he was lying in court. He has no business being a juror in this matter, and he is dismissed."

Penal Code section 1089 allows the trial court to discharge a juror who "upon . . . good cause shown to the court is found to be unable to perform [her] duty." "'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternative to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror "'must appear in the record as a demonstrable reality.'" [Citation.]' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)

"What constitutes 'actual bias' of a juror varies according to the circumstances of the case." (*People v. Nesler* (1997) 16 Cal.4th 561, 580.) "In assessing whether a juror is 'impartial' for federal constitutional purposes, the United States Supreme Court has stated: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.' [Citation.] '"The theory of the law is that a juror who has formed an opinion cannot be impartial." . . . An impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial." (*Id.* at pp. 580-581.) Under California law, "actual bias" is defined as '"the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' [Citations.] A sitting juror's actual bias that would have supported a challenge for cause also renders the juror unable to perform his or her duties and thus subject to discharge. [Citation.] 'Grounds for . . . discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists.'" (*Id.* at p. 581.)

The evidentiary hearing supported the trial court's finding of bias. According to most of the jurors, Juror No. 6 had either explicitly said he would not follow the law or he had implied as much. He apparently rejected the notion that, because of vicarious liability principles, Williams and Taylor might be guilty of the same crime. The trial court

was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest. (See *People v. Lucas* (1995) 12 Cal.4th 415, 489 [court properly relied on juror's demeanor in deciding juror could not deliberate fairly]; *People v. Beeler* (1995) 9 Cal.4th 953, 989 [recognizing importance of trial court's observation of juror's demeanor in reviewing decision to discharge]; *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 [trial court properly removed juror because his evasions under questioning led court to conclude he had violated order not to discuss case and lacked ability to follow instructions, keep open mind, and be objective].)

In her supplemental letter brief, Williams argues the trial court erred under the analysis contained in *People v. Cleveland*, *supra*, because all of the examined jurors "conceded Juror No. 6 never stated he was unwilling to follow the law, never stated he was applying a standard of proof [of] higher than beyond a reasonable doubt, never stated he was engaging or would engage in juror nullification," and because it was clear Juror No. 6 had been actively deliberating. This argument not only misstates the evidence, it ignores the trial court's explanation that it was discharging Juror No. 6 because he had shown himself to be biased, *not* because he was failing to deliberate or engaging in juror nullification.

2. *Sufficient evidence of special circumstance.*

Williams contends the felony-murder special circumstance finding must be set aside for the lack of sufficient evidence. This claim is without merit.

In evaluating the sufficiency of the evidence, an appellate court must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Hatch* (2000) 22 Cal.4th 260, 272; *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.) The task of the reviewing court is not to reweigh the evidence, but to decide if the record contains sufficient evidence to warrant the inference of guilt drawn by the trier of fact: "The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusion." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790; see also *People v. Rich* (1988) 45 Cal.3d 1036, 1081.)

Williams argues there was insufficient evidence to support a felony-murder special circumstance finding because she was neither a major participant in the underlying robbery, nor did she act with reckless indifference to human life. She is wrong. "A felony-murder special circumstance is applicable to a defendant who is not the actual killer if the defendant, either with the 'intent to kill' (§ 190.2, subd. (c)), or '*with reckless indifference to human life* and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [one of the eleven enumerated felonies].' (§ 190.2, subd. (d). . . .)" (*People v. Estrada* (1995) 11 Cal.4th 568, 572.) "'[R]eckless indifference to human life,'" as used in this context is a situation "in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death' [citation]. . . ." (*Id.* at p. 577, 46 Cal.Rptr.2d 586, 904 P.2d 1197.) The phrase "'reckless indifference to human life'" will be "commonly

understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death." (*Ibid.*)

Williams was a major participant because the evidence showed she planned the liquor store robbery and provided the transportation necessary to carry out the plan. (See *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [defendant and accomplice planned armed robbery at drug dealer's house].) The fact the robbery was carried out at a slightly different time than Williams may have contemplated does not change the result. Williams also acted with reckless indifference because she knew Taylor was armed and dangerous. Williams also left the crime scene without attempting to render aid or call for help for the victim. (See *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754 [defendant planned robbery, stood by as cohort stabbed victim and fled, leaving victim to die, thereby demonstrating reckless indifference to life].)

3. *Contents of reports relied upon by expert.*

Taylor contends the trial court erroneously prevented an expert witness from referring to the contents of reports relied on in forming his opinion. However, the trial court did not completely exclude all inquiry into the contents of such reports; the court merely refused to allow such evidence on direct examination because it constituted impermissible hearsay. There was no error because this is the general rule applicable to such evidence.

"Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon

by experts in the particular field in forming their opinions. (Evid.Code, § 801, subd. (b); . . .) Of course, any material that forms the basis of an expert's opinion testimony must be reliable. . . . [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. . . . [¶] A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.] A trial court also has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.] This is because a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof of any fact." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619; see *People v. McFarland* (2000) 78 Cal.App.4th 489, 495 ["Although an expert may base an opinion on reliable hearsay, such evidence is not independently admissible."].) Thus, "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts," but "[t]his rule does not preclude the cross-examination of an expert witness on the content of such reports." (*People v. Campos* (1995) 32 Cal.App.4th 304, 308.)

Taylor argues the trial court failed to engage in the required Evidence Code section 352 weighing process. The record shows, however, that the trial court recognized the matter should be dealt with on a fact-by-fact basis. Moreover, the information in the records that Taylor wanted put before the jury was, for the most part, brought out on either cross-examination or redirect examination. This included information regarding the physical and psychological abuse Taylor had suffered while growing up, the fact she had to be put into foster care because the DCFS found her mother's home unfit for children, and the fact that at 14 she was seeing a psychiatrist and complaining of hallucinations. [3]

4. *CALJIC No.* 2.62.

Taylor contends the trial court erroneously instructed the jury with CALJIC No. 2.62 (Defendant Testifying-When Adverse Interest May Be Drawn) during the sanity phase. This claim is meritless.

Taylor testified during the sanity phase of her trial. In connection with this testimony, the trial court, without objection, gave CALJIC No. 2.62 as follows: "In this case defendant has testified to certain matters. [¶] If you find that defendant failed to explain or deny any evidence against her introduced by the prosecution which she can reasonably be expected to deny or explain because of facts within her knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn

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[3] We also reject Taylor's assertion of cumulative error in connection with this claim.

therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against her does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that she would need to deny or to explain evidence against her, it would be unreasonable to draw an inference unfavorable to her because of her failure to deny or explain this evidence."

CALJIC No. 2.62, "if justified by the evidence, does not violate a defendant's privilege against self-incrimination, deny him the presumption of innocence, nor violate due process. (*People v. Saddler* (1979) 24 Cal.3d 671, 678 . . . .) [¶] When a defendant testifies but fails to deny or explain inculpatory evidence or gives a 'bizarre or implausible' explanation, the instruction is proper. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 . . . ; see also *People v. Belmontes* (1988) 45 Cal.3d 744, 784 . . . .) '[T]he applicability of CALJIC No. 2.62 is peculiarly dependent on the particular facts of the case.' (*People v. Roehler* (1985) 167 Cal.App.3d 353, 393 . . . .)" (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030.)

Taylor argues that giving CALJIC No. 2.62 in the sanity phase was erroneous because it altered or confused the burden of proof and advised the jury to draw improper inferences. We are unpersuaded. Taylor testified during the sanity phase, and the jury had heard much additional evidence regarding her commission of the robbery-murder, her abusive

childhood, her relationship with Williams, and the effect of all this on her mental state. If the jury perceived Taylor had failed to explain prosecution evidence that she could have been expected to explain, the jury was entitled to draw negative inferences.[4]

In any event, even if the instruction should not have been given, we cannot see that there was any prejudice. The reason Taylor was found sane was because neither the prosecution expert nor the defense expert concluded she had been insane when she committed the crime. Dr. Sharma testified he had concluded Taylor was sane. Dr. Miles conceded he had told the prosecutor he didn't think Taylor was insane. The most Miles would say was that because Taylor was under Williams's influence, as the result of some kind of brainwashing process, she was unlikely to refuse to do something Williams wanted her to do.

5. *Defense of unconsciousness instruction.*

Taylor contends the trial court had a sua sponte duty to instruct the jury with CALJIC No. 4.30 (defense of unconsciousness). This claim is meritless.

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[4] Although the instruction should have been reworded to tailor it for the sanity phase, the failure to do so would not have prejudiced Taylor because it referred to a prosecution burden of persuasion whereas it was Taylor who had the burden at this stage. (See *People v. Duckett* (1984) 162 Cal.App.3d 1115, 1119 ["A defendant has the burden of proof on the issue of sanity; if neither party presents credible evidence on that issue, the jury must find him sane."].)

"Where not self-induced, as by voluntary intoxication or the equivalent . . . , unconsciousness is a complete defense to a charge of criminal homicide. [Citations.] 'Unconsciousness,' as the term is used in the rule just cited, need not reach the physical dimensions commonly associated with the term (coma, inertia, incapability of locomotion or manual action, and so on); it can exist – and the above-stated rule can apply-where the subject physically acts in fact but is not, at the time, conscious of acting." (*People v. Newton* (1970) 8 Cal.App.3d 359, 376-377; see also *People v. Heffington* (1973) 32 Cal.App.3d 1, 9 ["unconsciousness includes not only a state of coma or immobility, but also a condition in which the subject acts without awareness"].)

Thus, for example, *People v. Bridgehouse* (1956) 47 Cal.2d 406, disapproved on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, and *People v. Wilson* (1967) 66 Cal.2d 749, held it was error to refuse an unconsciousness instruction where the defendant testified he did not remember crucial aspects of the incident. In *Bridgehouse*, the defendant testified he had only a vague or hazy memory of the shooting because "'[t]he whole action . . . was of such an explosive nature, . . . and so distorted by a haze of mental void.'" (*People v. Bridgehouse*, *supra*, 47 Cal.2d at p. 410.) In *Wilson*, the defendant claimed he had no memory of firing the shots that killed his wife and another person. (*People v. Wilson*, *supra*, 66 Cal.2d at p. 755.)

On the other hand, in *People v. Heffington*, *supra*, 32 Cal.App.3d 1, the defendant's recollection of a fight with the victim was merely hazy. "As a reviewing court we assume that his selective

recollection was natural, not feigned. Nonetheless, it fell far short of a claim or description of unawareness coexistent with the fight. In short, there was no claim or description of coexistent unconsciousness, either from the psychiatrists or defendant." *Heffington* found "no evidence 'deserving of consideration' that defendant was unaware of his actions." (*Id.* at p. 10.)

Here, Taylor had a fairly clear memory of the robbery. Even during her testimony, some six years after the event, she purported to recall with much specificity the events leading up to the robbery (for instance, the particular things Williams and Schantel told her just before she went into the liquor store) and the robbery itself (for instance, that Kim struggled and she put her knee on him to try and restrain him, and that although her eyes were closed while she was struggling with him her eyes were open when she ran out of the store).

The evidence here showed that Taylor had – as Dr. Sharma put it – knowingly engaged in a fairly typical armed robbery, albeit one during which a victim had been killed. There was no evidence Taylor was acting without consciousness. Indeed, the evidence tended to show the opposite – that Taylor was fully aware of her role as the perpetrator of an armed robbery. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 424 [unconsciousness instruction unwarranted where evidence showed the "defendant approached [the victim] and had the presence of mind to tell her to be quiet, to display a knife, and to take her to the secluded precincts of the Florence Flanner School. He asked her to remove her pants. Later she asked if she could put her pants back on,

applications to this case." Taylor asserts that, by giving a definition more appropriate to general intent than specific intent, the trial court committed prejudicial error because its language negated her defense that she was not responsible for the robbery-murder because she had been brainwashed by Williams.

We disagree. The trial court told jurors to consult the instructions already given for "the specific applications to this case," and those instructions told jurors that "[i]n the crime of robbery, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed. [¶] The specific intent required is included in the definition of the crime set forth elsewhere in these instructions."

The jurors were also told: "You have received evidence regarding a mental disease, defect, or disorder of the defendant at the time of the commission of the crime charged. You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, which is an element of the crime charged in count I, robbery/murder, and of the lesser crime of second-degree murder, or harbored malice aforethought, which is an element of the lesser crime of second-degree murder." The jurors were further instructed: "Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent to permanently deprive that person of the property, is

and he gave permission. All of these facts show a methodical, calculated approach to the crimes."].)

Taylor argues CALJIC No. 4.30 should have been given because "there was evidence that [she] was acting under the compulsion of a mental condition in which she was 'brainwashed' to do the robbery." But the evidence she cites is only Dr. Miles's testimony that, because of her relationship with Williams, Taylor was brainwashed into doing the robbery. Miles did not say that being "brainwashed" was the same as being unconscious. In fact, he equated the condition with being "under undue influence." Thus, Taylor fails to demonstrate how such a condition meets the legal definition of unconsciousness, and her reliance on such cases as *People v. Williams* (1971) 22 Cal.App.3d 34, 40 (evidence defendant experienced psychomotor epileptic fugue state at time of shooting), and *People v. Moore* (1970) 5 Cal.App.3d 486, 492, 85 Cal.Rptr. 194 (evidence defendant experienced schizophrenic fugue state at time of shooting), is clearly misplaced.

6. *Specific intent.*

Taylor contends the trial court erred when it responded to the jury's request for a clarification of the instructions during deliberations. This claim is meritless.

The jury sent the trial court a note asking for a lay person's explanation of the concepts of "mental state" and "specific intent." Taylor argues the trial court erred when it gave the following response: "'Mental state' refers to state of mind, and 'specific intent' refers to an intention to do a particular thing. Please consult the instructions for specific

warrant more lenient treatment, does not detract from the generally mandatory imposition of LWOP as the punishment for a youthful special-circumstance murderer. In the first instance, therefore, LWOP is the presumptive punishment for 16- or 17-year-old special-circumstance murderers, and the court's discretion is concomitantly circumscribed to that extent." (*People v. Guinn*, *supra*, 28 Cal.App.4th at p. 1142.)

Based on the fact the trial court sentenced Taylor to the "presumptive punishment" authorized by section 190.5, the People suggest the court could not have been unaware of its discretion to impose the lesser punishment. But the record reveals that at sentencing both the prosecutor and defense counsel told the trial court it had no discretion but to impose the life without possibility of parole sentence.[5] In light of this, the trial court's comment when pronouncing sentence – "The law is clear concerning the punishment to be imposed. It is life without possibility of parole."— gives us no confidence the court was aware it had discretion to impose a lesser sentence. We will, therefore, vacate Taylor's sentence and remand to the trial court for resentencing.[6] In so doing, we express no opinion on ,

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[5] The prosecutor said, "[t]he People believe that the only punishment prescribed by law is . . . an LWOP sentence." Defense counsel added, "Well, unfortunately, I cannot disagree. I don't think that the court has any discretion in this matter."

[6] In light of this holding, we need not reach Taylor's claim that her sentence constitutes cruel and unusual punishment, and Taylor will be able to raise her claim of improperly calculated presentence custody credits in the trial court.

guilty of the crime of robbery, in violation of Penal Code Section 211."

In light of these instructions, there was no error. The trial court's response did not mislead the jury into believing that specific intent was not an element of the crimes.

7. *Resentencing.*

Taylor contends we should remand for resentencing because the trial court was unaware of its discretion, pursuant to section 190.5, subdivision (b), to impose a term of 25 years-to-life, rather than life without the possibility of parole. This claim has merit.

Section 190.5, subdivision (b), provides that a defendant found guilty of special circumstances first degree murder, who was over 16 and under 18 at the time of the crime, "shall be confine[d] in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." This section provides "that 16- or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141.)

"Penal Code section 190.5 was amended specifically to make youthful offenders, who committed what would have been a death-eligible crime for an adult, subject to special circumstances and LWOP. The fact that a court might grant leniency in some cases, in recognition that some youthful special circumstance murderers might

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UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

TARA SHENEVA WILLIAMS Petitioner – Appellant, v. JAVIER CAVAZOS, Acting Warden of the Central California Women's Facility in Chowchilla, California Substituted for Gwendolyn Mitchell, Respondent – Appellee.	No. 07-56127 D.C. No. CV-03-02691-GW Central District of California, Los Angeles ORDER

Before: KOZINSKI, Chief Judge, REINHARDT, Circuit Judge, and WHYTE, Senior District Judge.*

The panel has voted unanimously to deny the petition for rehearing. Chief Judge Kozinski and Judge Reinhardt have voted to deny the suggestion for rehearing en banc, and Judge Whyte so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and suggestion for rehearing en banc are denied.

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* The Honorable Ronald M. Whyte, Senior District Judge for the U.S.District Court for Northern California, sitting by designation.

whether the trial court should or should not exercise such discretion in this case nor on what the sentence should be.

DISPOSITION

The judgment as to defendant Williams is affirmed. Defendant Taylor's sentence is vacated and her case remanded to the trial court for resentencing; in all other respects Taylor's judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

OPPOSITION BRIEF

No. 11–465

In the

Supreme Court of the United States

Javier Cavalos, Acting Warden
Petitioner,

v.

Tara Sheneva Williams,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief in Opposition

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Questions Presented

1. *Harrington v. Richter* clarified that, although a state court adjudication is presumptively a merits adjudication for federal habeas purposes, that presumption only survives absent any contrary (1) indication or (2) state-law procedural principle. Here, the panel determined Ms. Williams overcame the presumption because all evidence indicated that the state appellate court ignored Ms. Williams's Sixth Amendment claim while analyzing the holdout juror's mid-deliberation dismissal — at length — exclusively under a state statute. Did the panel properly apply *Richter*?

2. The Sixth Amendment prohibits discharging a juror based on his or her views on the merits of the case; thus, judges are not supposed to question a holdout juror's views. Here, a state trial judge granted a prosecutor's motion to dismiss a known holdout juror without good cause and based on the juror's mid-deliberations view that insufficient evidence existed to prove felony murder. Did the panel below properly find a Sixth Amendment violation?

Parties to the Proceeding

Petitioner: Although Petitioner's brief lists Javier Cavazos as Acting Warden of the Central California Women's Facility at Chowchilla, California, he is no longer in that position. His successor is listed as Lydia C. Hense, Warden (A).[1/] This Court should automatically substitute Lydia C. Hense,[2/] or to avoid further name changes, substitute Matthew Cate,[3/] Secretary of the California Department of Corrections and Rehabilitation, as successor Petitioner.[4/]

Respondent: Tara Sheneva Williams is the Respondent.

[1/] California Department of Corrections and Rehabilitation, http://twww.cdcr.ca.gov/Facilities_Locator/CCWF.html (last visited Dec. 13, 2011).

[2/] Sup. Ct. R. 35.3.

[3/] California Department of Corrections and Rehabilitation, http://www.cdcr.ca.gov/About_CDCR/cate.html (last visited Dec. 13, 2011).

[4/] Fed. R. App. P. 43(c)(2).

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Statutory Provision Involved

Under 28 U.S.C. § 2254(d), federal courts may grant habeas relief to a state prisoner "with respect to any claim that was *adjudicated on the merits* in State court proceedings" only if that adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[5/]

Statement of the Case

One afternoon in 1993, Respondent Tara Sheneva Williams agreed to drive around Carde Taylor and Schantel W., to case stores for a potential robbery later that night. One store they visited was a liquor store, which Taylor and Schantel entered while Ms. Williams waited in the car. The two emerged a few seconds later, but then Taylor went back in, pointed a gun at the proprietor and, in the course of emptying the cash register, shot and killed him. Taylor

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[5/] 28 U.S.C. § 2254(d) (emphasis added).

and Ms. Williams eventually admitted to being present and that Taylor had killed the owner. Ms. Williams told the police that, while she knew Taylor was armed, there had never been a plan to rob the store during daylight hours.[6/]

Taylor and Ms. Williams were each charged with special circumstances murder and a firearm enhancement; they were tried separately. After a five-day jury trial, Ms. Williams was found guilty of special-circumstances murder and the firearm enhancement, which resulted in a sentence of life imprisonment without the possibility of parole (LWOP).[7/]

But Ms. Williams was convicted only after the trial court dismissed a known holdout juror (No. 6) mid-deliberations and replaced him with an alternate.[8/] This dismissal resulted in federal habeas relief and Petitioner's certiorari petition.

Two days after the jurors began deliberations, the jury foreman wrote the trial court a note indicating that Juror No. 6 expressed an intention to disregard the law and expressed concern about

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[6/] Pet'r's app. 6a.

[7/] *Id.*

[8/] Pet'r's app. 7a.

the severity of the first-degree-murder charge. The trial court then questioned the foreman without the other jurors present.[9]

Jury foreman (Juror No. 8) confirmed that no juror had "expressed any concern about punishment or the punishment that one might expect to flow from a certain conviction," which the jury had been expressly instructed it could not do. When asked what was meant by his note's phrase "has expressed concern relative to the severity of the charge," the foreman replied that Juror No. 6 repeatedly (10 or 15 times) expressed his belief that there was *insufficient evidence*. Because the trial court had just instructed all jurors that it was *not* permissible for a juror to interpret page 32 of the jury instructions to mean that the conspiracy should involve a plan to commit a *specific* robbery, rather than a general plan to commit robberies in the future, the foreman opined that that instruction "may be sufficient to resolve [the jurors'] concern [about Juror No. 6] at this time."[10]

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[9] Pet'r's app. 7a-8a.

[10] Pet'r's app. 9a.

Despite the foreman's opinion that the jurors' concern about Juror No. 6 may be resolved, upon the prosecutor's motion, and over Ms. Williams's objection, the trial court halted jury deliberations and questioned the foreman again the next day. According to the foreman, on the first day of deliberations, Juror No. 6 had brought up historical instances "when juries have refused to follow the law," such as in pre-Civil War prosecutions for harboring fugitive slaves and during the Vietnam War era for burning draft cards. The foreman expressed his opinion that Juror No. 6 had "a belief ... that [there] is a civic responsibility to — there's a name for this — civil disobedience. There's a responsibility to be disobedient in that case." But when the foreman asked Juror No. 6 "if that's what was going on here," Juror No. 6 said "no."[11/]

The foreman testified that Juror No. 6 had expressed his view that first degree murder was a severe charge, which affected the "way he interprets the evidence and the standard he uses for doubt." Juror No. 6, according to the foreman, had made a "fairly clear statement ... that connects the severity of the charge with — explicitly of

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[11/] *Id.*

first degree murder with his need for a higher standard." But the foreman conceded that Juror No. 6 had not expressed an unwillingness to follow the law or the jury instructions on the standard of proof. The foreman also agreed that Juror No. 6 tried to explain "the basis for his reasonable doubt" to the other jurors many times and had actively engaged in "intellectual conversation with them, listening to their questions, trying to answer them."[12/]

Juror No. 6 then testified that no juror had indicated being motivated by the issue of possible punishment in the case, and that no juror had even used the word "punishment." He denied using a higher burden of proof based on the severity of the first degree murder charge, and stated, *"I think that the same burden of proof should be used for any criminal offense, higher than a civil trial, but all criminal trials should have — whether it's first degree murder or not should have the same burden of proof."* He recalled the court's instruction regarding what constituted proof beyond a reasonable doubt, and testified that he agreed to follow it as he understood it. He expressed his understanding of the instruction as: "not proof —

[12/] *Id.*

there's always some possible doubt in any human affair, but if you have a reasonable doubt based on the evidence and only on the evidence that was presented at trial, if you have a reasonable doubt about a defendant's guilt, under the law, you are required to vote not guilty."[13]

Although Juror No. 6 could not initially recall anyone discussing the severity of the charge, he amended his answer because he remembered saying that this is a very important case and that jurors should be *very convinced* that a guilt finding is based on proof that meets the beyond-a-reasonable-doubt standard. Other than that, Juror No. 6 denied mentioning the severity of the charge.[14]

When asked about the difference between proving a criminal charge under the standard of "beyond a reasonable doubt" and proving the same charge under the standard of "very convinced beyond a reasonable doubt," Juror No. 6 began to answer "No, they're the same standards as far as —" when the court cut him off, asking, "What does 'very convinced' add?" Juror No. 6 responded, *"It just means ... it's a good idea to pay particular attention to what evidence*

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[13] Pet'r's app. 10a.

[14] Pet'r's app. 10a-11a.

was presented at the trial and make sure before we decide on a verdict, that we are convinced — if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial."[15]

Juror No. 6 even reiterated that *"convinced beyond a reasonable doubt is the standard, and I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt. I think it's the same thing."*

While admitting that he had discussed historical examples of jury nullification because another juror had raised the issue, Juror No. 6 testified that he rejected jury nullification and that jurors should base their decision solely on the evidence presented at trial.[16]

The prosecutor asked the court to remove Juror No. 6. The court stated that it was "inclined to rule that the juror has engaged in misconduct. He's applying a higher burden of proof than the law requires ... and ... he isn't lying, but intentionally withheld honest information."[17] The court noted that Juror No. 6 had "contradicted

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[15] Pet'r's app. 11a (emphasis added).

[16] *Id.*

[17] Pet'r's app. 12a.

himself," because he initially answered that no juror had discussed juror nullification or the seriousness of the charge, but later admitted that he had responded to a juror's question about jurors not following the law. But the court decided to first question the other jurors about Juror No. 6, in order to develop a "fuller record."[18]

Six jurors (Nos. 3, 5, 7, 10, 11, and 12) stated that, in their opinion, Juror No. 6 was not following the law. But when questioned further, four of those six (Nos. 5, 7, 11, and 12) acknowledged that Juror No. 6 had never said as much, but two (Nos. 3 and 10) reported that Juror No. 6 had said, "in essence," that he would not follow the law. The other four (Nos. 1, 2, 4, and 9) thought that Juror No. 6 was following the law, and, in the words of Juror No. 2, was "being honest." Those jurors thought there was just a difference in opinion over how the law applied to the facts of the case. Juror No. 9, for example, explained that Juror No. 6 had tried to explain his view, "but none of us really understood it the way he did." Only five jurors (Nos. 1, 2, 5, 7, and 11) mentioned jury nullification at all, of which just one (No. 2) thought Juror No. 6 might actually be engaging in

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[18] *Id.*

the practice. Additionally, two jurors (Nos. 2 and 5) felt that Juror No. 6 disapproved of the theory of accomplice liability. Six jurors (Nos. 2, 3, 4, 9, 10, and 11) explained that Juror No. 6 did not believe that the evidence was sufficient to prove guilt of murder beyond a reasonable doubt.[19]

After interrogating the jurors for two hours, mid-deliberations, the court dismissed Juror No. 6, under California Penal Code section 1089, which provides for the discharge of jurors for good cause. Notably, the court ruled that its dismissal of Juror No. 6 was "[1] *not* because he's not deliberating and [2] *not* because he's not following the law."[20]

Instead, the trial court dismissed Juror No. 6 "as a biased juror," because "his mind is bent ... against the prosecution," as evidenced by his statements concerning the government's burden of proof, his disagreement with the felony-murder rule, and his "dishonest[y]" in recounting whether anyone had discussed the severity of the charge or juror nullification.[21]

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[19] Pet'r's app. 12a-13a.

[20] Pet'r's app. 13a (emphasis added).

[21] Pet'r's app. 13a-14a.

An alternate juror immediately replaced Juror No. 6. The next day, the jury returned a guilty verdict against Ms. Williams for first degree murder,[22] which resulted in a sentence of life without the possibility of parole (LWOP).[23]

Ms. Williams appealed, claiming that the trial court had (1) abused its discretion in applying section 1089, and (2) violated her Sixth Amendment rights, by dismissing Juror No. 6. The California Court of Appeal affirmed her conviction on the state-law ground, but completely ignored her Sixth Amendment claim.[24]

Reasons for Denying the Writ

1. There is no split in authority warranting this Court's intervention.

This case presents an unremarkable application of *Harrington v. Richter*.[25] *Richter* clarified that, although state court adjudications are presumptively "on the merits," that presumption survives only absent "any indication or state-law procedural principles to the

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[22] Pet'r's app. 14a.

[23] Pet'r's app. 6a.

[24] Pet'r's app. 14a.

[25] *Harrington v. Richter*, 131 S. Ct. 770 (2011).

contrary."[26] *Richter* states that the "presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely."[27] Here, the Ninth Circuit thoroughly reviewed (1) *Richter*, (2) the principles of federalism underlying AEDPA, and (3) the record in this case, and determined that, as a factual matter, Ms. Williams overcame the presumption of a merits adjudication because the state appellate court's detailed analysis of the state-law claim revealed that that court simply overlooked the federal claim.

The complete lack of dissent in the entire Ninth Circuit shows that this case is not certiorari worthy. Notably, in recent years, where Ninth Circuit panels have erroneously eschewed AEDPA's strictures, other Ninth Circuit Judges have issued sharp dissents. The following cases, including *Richter*, illustrate this fact:

- *Smith v. Mitchell*, 453 F.3d 1203, 1208 (9th Cir. 2006) (Bea, J., dissenting from denial of rehearing en banc), *rev'd sub nom. Cavazos v. Smith*, 132 S. Ct. 2 (2011);

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[26] *Id.* at 785.

[27] *Id.*

- *Moore v. Czerniak*, 574 F.3d 1092, 1162–65 (9th Cir. 2009) (Callahan, J., dissenting from denial of rehearing en banc), *rev'd sub nom. Premo v. Moore*, 131 S. Ct. 733 (2011);
- *Richter v. Hickman*, 578 F.3d 944, 969–78 (9th Cir. 2009) (Bybee, J., dissenting from en banc opinion), *rev'd sub nom. Harrington v. Richter*, 131 S. Ct. 770 (2011); and
- *Pinholster v. Ayers*, 590 F.3d 651, 684–85 (9th Cir. 2009) (Kozinski, C.J., dissenting from en banc opinion), *rev'd sub nom. Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

Here, however, not only was there no dissent, not a single one of the 26 then-active judges of the Ninth Circuit even requested a vote for rehearing en banc.[28] This complete lack of dissent shows that granting certiorari is not warranted here where the panel expressly followed *Richter*.

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[28] Pet'r's app. at 119a.

In addition, Petitioner's circuit-conflict claim is overblown. The chief conflicting authority, according to the Petition, is the Eleventh Circuit's opinion in *Childers v. Floyd*.[29] But, no matter how this Court rules on the petition for certiorari in that case, there is no conflict between this case and *Childers*.

First, *Childers* is easily distinguishable because nine of the Florida appellate court judges discussed Childers's federal Confrontation Clause claim. But here the California appellate panel ignored Ms. Williams's federal claim completely.

In *Childers*, although the Florida appellate court's 15-page per curiam opinion did not mention the federal claim, that "opinion did not speak for all of the court's judges."[30] Nine judges "wrote [20-pages of] separate opinions concurring in or dissenting from the court's judgment."[31] Several judges "specifically referenced United States Supreme Court precedent concerning the Confrontation

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[29] *Childers v. Floyd*, 642 F.3d 953 (11th Cir. 2011) (certiorari petition No. 11–42 pending).

[30] *Id.* at 965 (citing concurring and dissenting opinions from *Childers v. State*, 936 So. 2d 585, 599–619 (Fla. Dist. Ct. App. 2006)).

[31] *Id.*

Clause."[32] In fact, some dissenting judges, including the chief judge, concluded that the per curiam opinion violated Childers's Confrontation Clause right.[33] And another judge found that the trial court did not violate Childers's Confrontation Clause rights.[34] Thus, *Richter*'s merits-review presumption obviously could not be overcome in *Childers* because numerous concurring and dissenting Florida appellate judges did, in fact, discuss the Confrontation Clause issue, which shows that the state court did not overlook it.

In contrast, Ms. Williams's case involves a classic example of a state appellate court, made up of fallible human beings, that failed to address the federal nature of Ms. Williams challenge to the trial judge's decision to jettison the holdout juror mid-deliberations. As the panel below found, "here the state court did not address [Ms.] Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the [California] Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed

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[32] *Id.*

[33] *Id.*

[34] *Id.*

at length."[35] Further, "the total disparity between" the California court's treatment of "[Ms.] Williams's statutory claim (reasoned in detail) and her constitutional claim (not mentioned at all) provides a strong 'indication' [under *Richter*] that the claim was never adjudicated on the merits."[36] Thus, under *Richter*, the presumption is easily overcome.

The Ninth Circuit's "'reason to think some other explanation for the state court's decision is more likely,' [*Richter*, 131 S. Ct. at 784–85]" came "in part from common sense" and from the court's "own experience as sometimes-fallible judges."[37] When judges "write thorough 29-page decisions as the state court did here, yet completely fail to address a particular issue, even in an oblique, tangential, or summary manner, it is most often because [the court] so focused on the remainder of the opinion that [the court] overlooked the issue [that it] did not mention directly or indirectly."[38] Any court is capable of occasionally making mistakes or overlooking an argument

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[35] Pet'r's app. 23a-24a n.10.

[36] Pet'r's app. 24a n.10.

[37] Pet'r's app. 25a n.11.

[38] *Id.*

raised on appeal. Here, "[i]t is most unlikely that the state court methodically analyzed each issue presented on appeal except one, a substantial claim of the violation of a federal constitutional right, which it chose to deny on the merits without saying a word."[39]

Second, there is a critical analytical difference between *Childers*, involving review of a Florida conviction, and this case, involving review of a California conviction. Under Florida law, a party has no right to a reasoned opinion.[40] By contrast, the California constitution requires that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."[41] Because non-meritorious contentions are often included in briefs, a California appellate court can simply state at the end of its opinion that the remaining issues "do not merit discussion."[42] But the state appellate court did not state that here.

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[39] *Id.*

[40] *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 989 (Fla. 2004).

[41] Cal. Const. art. 6, § 14.

[42] *People v. Rojas*, 174 Cal. Rptr. 91, 92–93 (Ct. App. 1981). *See generally* Jon B. Eisenberg, et al., Cal. Prac. Guide Civ. App. & Writs ch. 11-C § 2.

The differences noted above control. *Richter* recognized that California's courts and legislature define California's appellate (and collateral review) procedures, which in turn determines the significance under AEDPA of the state court's failure to expressly address a federal claim.[43] *Richter*'s rule makes sense in California. In Fiscal Year 2008–2009, original criminal writs filed in the California Supreme Court, a single court consisting of seven justices, numbered 3,262. In contrast, in the same period, 6,819 direct criminal appeals were filed in the California Court of Appeal, a court comprised of six districts in which 105 appellate justices decide appeals. Given these numbers, California's appellate justices obviously have far more time to produce reasoned decisions in *direct criminal appeals* than California Supreme Court justices have to issue reasoned decisions denying *habeas* petitions.[44]

Article 6, section 14, of the California Constitution requires a reasoned merits decision on direct appellate review. But that

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[43] *Richter*, 131 S. Ct. at 785.

[44] *2010 Court Statistics Report*, Judicial Council of California, at pp. IX-X, http://www.courts.ca.gov/12941.htm (last visited Dec. 16, 2011).

constitutional provision did not come into play in *Richter* because Richter filed a state *habeas* petition with the California Supreme Court, which was summarily denied. "[U]nlike an appeal, a writ petition may be summarily denied without a written opinion."[45] There was thus no reasoned opinion at any level in *Richter*.[46] But as *Richter* noted, issuing summary dispositions on habeas corpus lets California courts concentrate judicial resources where most needed, i.e., on direct review.[47] Here, the state decision at issue — the California Court of Appeal's decision on direct review — is just such a decision in which the California legislature has directed the California courts to take the time to issue reasoned decisions. The lack of a reasoned decision, or even acknowledgment of Ms. Williams's Sixth Amendment argument, in the direct review decision, strongly suggests that it simply was not considered.

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[45] *State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd.* 81 Cal. Rptr. 3d 486, 494 (Ct. App. 2008).

[46] *Richter*, 131 S. Ct. at 783.

[47] *Id.* at 783–85.

Richter established that, although federal habeas courts apply *Ylst v. Nunnemaker*'s look-through doctrine,[48] and thus look through to the "last reasoned state-court opinion,"[49] a federal habeas petitioner cannot avoid AEDPA's adjudication-on-the-merits presumption where state law gave him no right to any reasoned opinion as with California's *habeas* rules. But here, unlike the prisoners in *Richter* and *Childers*, Ms. Williams had a state constitutional right to a decision "in writing with reasons stated,"[50] because the last reasoned state-court opinion was on direct, not collateral habeas, review.

Under *Ylst v. Nunnemaker*, the Ninth Circuit properly reviewed the last reasoned state-court opinion in this case, the court of appeal opinion of January 18, 2002,[51] to determine whether AEDPA deference was warranted under *Richter*.[52] By its terms, the Ninth Circuit's AEDPA holding was narrow and strictly followed *Richter*.

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[48] *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

[49] *Id.*

[50] Cal. Const. art. 6, § 14.

[51] Pet'r's app. 87a-118a.

[52] *See* Pet'r's app. 18a-28a.

This is a "rare case[ ]"[53] where the state appellate court's "decision was *not* 'unaccompanied by an opinion explaining the reasons relief has been denied,' [*Richter*, 131 S. Ct.] at 784; rather, the [state appellate] court provided a lengthy, reasoned explanation for its denial of [Ms.] Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly."[54] As the Ninth Circuit recognized, "[m]ost of the time," "the strictures of § 2254(d) apply" because the state court will have considered the federal claim.[55] Here, that presumption does not apply under *Richter*'s strictures.

The Ninth Circuit also recognized, "a state court may adjudicate the merits of a constitutional claim without citing federal precedent, and such a decision would be entitled to AEDPA deference."[56] "And under *Richter*, even 'when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied,' [fed-

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[53] Pet'r's app. 20a.

[54] Pet'r's app. 23a.

[55] Pet'r's app. 18a.

[56] Pet'r's app. at 23a (citing *Early v. Packer*, 537 U.S. 3, 8 (2002)).

eral habeas courts] ... must 'presume[ ] that the state court adjudicated the claim on the merits *in the absence of any indication or state-law procedural principles to the contrary.*'"[57]

The Ninth Circuit avoided AEDPA deference only after finding no plausible explanation, other than oversight, for the state court's failure to discuss the federal claim. Distinguishing a prior en banc Ninth Circuit plurality opinion that enforced AEDPA deference where there was at least an "indication" that the state court had addressed a federal claim, albeit "only obliquely,"[58] the panel below observed that the "state court did not address [Ms.] Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the [California] Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed at length."[59]

Here, the state appellate "court simply failed to decide the [federal] claim without explanation."[60] As this Court stated in *Cone*

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[57] *Id.* (quoting *Richter*, 131 S. Ct. at 784–85) (emphasis added).

[58] Pet'r's app. 23a-24a n.10 (quoting *Murdoch v. Castro*, 609 F.3d 983, 990 n.6 (9th Cir. 2010) (en banc)).

[59] *Id.*

[60] Pet'r's app. 18a.

v. Bell, in 2009, when, as here, it is clear that the "[state] courts did not reach the merits of [the petitioner's constitutional] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.' 28 U.S.C. § 2254(d). Instead, the claim is reviewed *de novo*."[61]

De novo review is appropriate because Ms. Williams properly raised her constitutional claim, and the state court ignored that claim. Here, "[i]t is obvious, not "theoretical" or "speculat[ive]," that Ms. Williams's constitutional claim was not adjudicated at all, and so *Richter*'s presumption is overcome under *Richter*'s own terms.[62]

That the state appellate court discussed Ms. Williams's *statutory* claim at length, "but made no mention whatsoever of her more fundamental *constitutional* claim, is a compelling 'indication' that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision."[63]

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[61] *Cone v. Bell*, 556 U.S. 449,129 S. Ct. 1769, 1784 (2009).

[62] *Richer*, 131 S. Ct. at 785.

[63] Pet'r's app. 24a (citing *Richter*, 131 S. Ct. at 785).

"[W]hen a court simply says "claims denied," and nothing more," courts "presume the denial is on the merits and as to all claims, [*Richter*, 131 S. Ct. 784–85] but when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, 'there is reason to think' that it 'is more likely' that the court simply neglected the issue and failed to adjudicate the claim."[64]

Given this exceptionally narrow, fact-based holding, and strict application of *Richter*, it is difficult to see how this case could possibly handicap the State of California in advocating for AEDPA deference in future cases. Although Ms. Williams disagrees with Petitioner's various assignments of error, the Ninth Circuit's rigorous *Richter* analysis places this case squarely within the principle that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[65] Even accepting all of Petitioner's critiques, there is no reason to believe that the panel decision will have a significant impact beyond its rare facts.

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[64] Pet'r's app. 24a-25a.

[65] Sup. Ct. R. 10.

Reduced to its essence, the Petition's argument is that, if this Court should decide to grant certiorari in *Childers*, the Court may as well grant certiorari in this case based on a superficial inconsistency between the two cases. Ultimately, however, there is no reason that a ruling by this Court in *Childers* should affect the result in this case. Unlike *Childers*, which granted deference to a published en banc state court decision, where the dissenting state-court judges cited the federal claims that the majority overlooked,[66] the Ninth Circuit in this case found not a scintilla of evidence that the unpublished state decision actually adjudicated the Sixth Amendment claim. Beyond these factual distinctions, the federalism principles guiding AEDPA review do not demand perfect consistency between *Childers* and this case, given the fundamental differences between California's and Florida's divergent appellate and collateral review systems. This Court should, therefore, deny the Petition.

2. The panel opinion below is a correct application of federal law and correct factually.

Habeas relief was appropriate based on a Sixth Amendment violation because (1) a reasonable possibility exists that the prose-

[66] *See Childers v. State*, 936 So. 2d 585 (Fla. Dist. Ct. App. 2006).

cutor's request for the juror's discharge stemmed from his views of the merits of the case, and (2) the trial judge lacked "good cause" to remove the known holdout juror mid-deliberations.

a. The panel below followed federal law in ruling on Ms. Williams's Sixth Amendment claim.

This Court, in 1968 in *Duncan v. Louisiana*,[67] made clear that the Sixth Amendment, which applies to the states, does not allow a trial judge to discharge a juror based on his or her views of the merits of the case. In 1970, in *Williams v. Florida*,[68] this Court confirmed that the jury as a *group*, not the judge, decides guilt or innocence. And in 1933, in *Clark v. United States*,[69] Justice Cardozo eloquently explained why judges are not even supposed to be aware of a known holdout juror's views during deliberations.[70] "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[71] Here, the holdout juror's argu-

[67] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

[68] *Williams v. Florida*, 399 U.S. 78, 100 (1970).

[69] *Clark v. United States*, 289 U.S. 1, 13, 16 (1933).

[70] Pet'r's app. 33a.

[71] *Id.* (quoting *Clark*, 289 U.S. at 13).

ments were revealed to the prosecutor, who then succeeded in eliminating that holdout juror mid-deliberations.

The Ninth Circuit correctly asked whether the juror's discharge stemmed from his views of the merits, and whether the grounds on which the trial court relied in dismissing the known holdout juror were constitutional.[72]

Consistent with prior circuit decisions in the Ninth, Second, and D.C. Circuits, the Ninth Circuit panel relied upon cases that were decided years before Ms. Williams's conviction became final in 2002, namely: (1) *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999); (2) *United States v. Thomas*, 116 F.3d 606, 623 (2d Cir. 1997); and (3) *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987).[73]

"Following *Brown*'s holding and *Syminton*'s reasoning," the panel here held that, to comply with the Sixth Amendment, "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of

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[72] Pet'r's app. 34a.

[73] Pet'r's app. 29a, 33a-34a, 36a.

the case, the court must not dismiss the juror."[74] Under this standard, "the discharge of Juror No. 6 violated [Ms.] Williams's Sixth Amendment rights.[75] Two-thirds of the jury panel stated — mid-deliberations — that Juror No. 6 did not believe that the evidence was sufficient to prove guilt beyond a reasonable doubt.[76]

Based on hours of rigorous questioning into the thought processes and reasoning of Juror No. 6, the prosecutor knew about Juror No. 6's views regarding the insufficiency of the evidence at that point in the deliberations.[77] As in *Brown*,[78] "[g]iven the [reasonable] possibility" that the request to discharge the juror "stemmed from his belief that the evidence was inadequate to support a conviction," the panel here found "that his dismissal violated" Ms. Williams's Sixth Amendment right to a fair jury trial.[79]

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[74] Pet'r's app. 37a-38a, 39a.

[75] Pet'r's App. 39a.

[76] Pet'r's App. 39a-40a.

[77] Pet'r's app. 40a.

[78] *Brown*, 823 F.2d at 597.

[79] Pet'r's App. 40a-41a.

b. The panel's detailed analysis shows there was no basis for concluding that the holdout juror was biased against the government merely because he wanted evidence that would convince him beyond a reasonable doubt of guilt.

Last, Petitioner argues that the Ninth Circuit failed to defer to the trial judge's factual findings.[80] This argument fails.

Petitioner tries to compare the panel opinion in this case to *Felkner v. Jackson*,[81] and *Rice v. Collins*,[82] because in those cases this Court reversed the Ninth Circuit for disregarding state court factual findings. But this case is nothing like *Felkner* or *Rice*. Both *Felkner* and *Rice* were *Batson* cases. Under *Batson*,[83] when a prosecutor strikes a juror and proffers a race-neutral reason for exercising a peremptory strike, the defendant must prove that the prosecutor really had a race-based reason for striking the juror. A trial judge ruling on a *Batson* challenge must determine whether the prosecutor's race-neutral reason is true or whether the prosecutor's

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[80] Cert. Pet. 26–29.

[81] *Felkner v. Jackson*, 131 S. Ct. 1305 (2011) (per curiam).

[82] *Rice v. Collins*, 546 U.S. 333 (2006).

[83] *Batson v. Kentucky*, 476 U.S. 79 (1986).

strike was racially motivated.[84] In contrast, the issue raised here has nothing to do with *Batson*, and the focus is not on a prosecutor's proffered reasons. Rather, the issue here is whether the trial judge had good cause for finding that the holdout juror was biased. As Petitioner concedes, bias is defined as actual bias, or partiality.[85] The only support the trial court had for its conclusion that the holdout juror was "biased" is the fact that, mid-deliberations, Juror No. 6 wanted to be very convinced that the evidence supported the murder charge before he would find Ms. Williams guilty and some jurors were frustrated by this. But as the panel below found, there was no support in the record for a finding of actual bias. First, "*none* of the jurors expressed the view that Juror No. 6 was biased."[86] Second, the trial judge did not find Juror No. 6 biased under any traditional definition.[87] And none of the trial court's reasons for

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[84] *Rice*, 546 U.S. at 338.

[85] Cert. Pet. 25.

[86] Pet'r's app. 41a.

[87] Pet'r's app. 42a.

finding bias actually constitute bias.[88] Wanting to be very convinced does not constitute bias.

More important, as Petitioner acknowledges, the panel below held that "even if we presume all the facts found by the state court to be correct, 28 U.S.C. § 2254(e)(1), we conclude that the record discloses a 'reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case.'"[89] This is so because the facts found by the state court do not support a finding that Juror No. 6 was biased against the prosecution. As the panel's discussion of the juror comments makes clear, the jurors revealed Juror No. 6's belief — at that stage of the deliberations — that the evidence was not sufficient on the felony murder charge.[90] The jury comments about their deliberations speak for themselves. Once Juror No. 6's beliefs about the evidence were revealed in open court, a reasonable possibility exists that the prosecutor moved to dismiss Juror No. 6 and the judge granted that motion based on Juror No. 6's views on the evidence.

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[88] Pet'r's app. 43a-48a.

[89] Pet'r's app. 40a (quoting *Symington*, 195 F.3d at 1087).

[90] Pet'r app. 40a.

Although this reason alone is enough to require granting habeas relief, the trial court's lack of "good cause" for removing the known holdout juror, independently supports the same result.[91] The panel below carefully analyzed the trial court's decision to dismiss the holdout juror and the jurors's comments that ostensibly supported that decision.[92] First, the record shows that Juror No. 6 was willing to follow the law.[93] Second, and most important, Juror No. 6 did not seek to apply an incorrectly heightened standard more onerous than the beyond-a-reasonable-doubt standard. The panel's illumination of the record shows this beyond a shadow of a doubt.[94] Third, the record manifestly shows that Juror No. 6 never discussed punishment, as opposed to the seriousness of the felony murder charge.[95] Finally, the record and the trial court's own earlier comments patently show that Juror No. 6 did not lie or withhold information during the court's mid-deliberation interrogation of the jur-

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[91] Pet'r's app. 41a-42a.

[92] Pet'r's app. 44a-51a.

[93] Pet'r's app. 44a-45a.

[94] Pet'r's app. 45a-48a.

[95] Pet'r's app. 48a-50a.

ors.[96] Thus, none of the trial court's determinations, individually or collectively, regarding Juror No. 6, established the "good cause" required by the Sixth Amendment to remove an actively deliberating juror. This is a separate reason, independent of the *Symington* violation, that supports the panel's holding that the dismissal of a known holdout juror was unconstitutional here.[97]

Thus, here, either of two conclusions, standing alone, warranted reversal. Together, the constitutional violation is pellucid.[98] First, there is at least a reasonable possibility that Juror No. 6's discharge stemmed from his disagreement with his peers over their views of the merits of the case. Second, there was no good cause to justify the juror's discharge. Jettisoning holdout Juror No. 6, mid-deliberations, deprived Ms. Williams of her constitutional right to a fair jury trial.[99] Thus, granting Petitioner's certiorari petition is not warranted because the panel followed *Richter* and reached the correct legal and factual conclusion.

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[96] Pet'r's app. 50a-51a.

[97] Pet'r's app. 52a.

[98] *Id.*

[99] Pet'r's app. 52a-53a.

Conclusion

For the foregoing reasons, the Court should deny certiorari.

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Certificate of Compliance

Under Supreme Court Rule 33.1(g)-(h)

I certify that:

The attached is Brief in Opposition is proportionately spaced, has a typeface of 14 points or more and contains 6,408 words, which is less than the 9,000-word limit indicated in Supreme Court Rule 33.1(g)(ii).

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No. 11–465

In the

Supreme Court of the United States

Javier Cavazos, Acting Warden,
Petitioner,
v.
Tara Sheneva Williams,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Proof of Service

I, Kurt David Hermansen, do declare that on_____, as required by Supreme Court Rule 29, I have served the enclosed **Motion to Proceed *in Forma Pauperis* and Brief in Opposition** on each party to the above-proceeding or on that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid.

I served the aforementioned on the following in the manner described above:

1. Stephanie C. Brenan, Deputy Attorney General, 300 South Spring St., Ste. 1702, Los Angeles, CA 90013;
2. Tara Sheneva Williams, CDCR# W82693, Central California Women's Facility, P.O. Box 1508, Chowcilla, CA 93610.
3. Clerk, Supreme Court of the United States, Washington, D.C. 20543.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____
Kurt David Hermansen, Declarant

REPLY BRIEF

Supreme Court, U.S.
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No. 11-465

In the Supreme Court of the United States

JAVIER CAVAZOS, ACTING WARDEN OF THE CENTRAL CALIFORNIA WOMEN'S FACILITY AT CHOWCHILLA, *Petitioner*,

v.

TARA SHENEVA WILLIAMS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF FOR PETITIONER

On the first question presented in the petition—whether there is a 28 U.S.C. § 2254(d) adjudication "on the merits" of a habeas corpus petitioner's claim where a state court denies relief in an explained opinion that does not expressly address the federal constitutional argument made by the prisoner in support of his claim—certiorari is warranted for three main reasons. *One,* the Ninth Circuit's restriction on the reach of the § 2254(d) deference rule represents an important federal question. *Two,* the Ninth Circuit's opinion conflicts with the Eleventh Circuit's en banc decision in *Childers* v. *Floyd*, 642 F.3d 953 (11th Cir. 2011) (*en banc*), petition for cert. filed, 80 U.S.L.W. 3055 (U.S. Jul. 6, 2011) and with the Eighth Circuit's decision in *Cox* v. *Burger*, 398 F.3d 1025 (8th Cir. 2005). The Ninth Circuit rule is—despite an alleged exception that proves illusory, see page 4, *post*—that there is no § 2254(d) merits adjudication where the state court's explained denial of relief does not expressly say that it is deciding the federal question. Pet. App. at 23a-28a. By contrast, the Eleventh Circuit holds that the state-court ruling constitutes a § 2254(d) adjudication on the merits unless the state court explicitly invokes a state procedural ground for denying the claim. *Childers*, at 968-69; accord, *Loggins* v. *Thomas*, 654 F.3d 1204, 1217 (11th Cir. 2011). And the Eighth Circuit focuses on whether the state court's decision contradicts this Court's precedents. *Cox,* at 1029-30. *Three,* the Ninth Circuit's overly restrictive rule is inconsistent with: *Harrington* v. *Richter*, 131 S. Ct. 770, 784-85 (2011), which presumed a merits adjudication even from an unexplained denial of relief; and with *Coleman* v. *Thompson*, 501 U.S. 722, 733 (1991), and *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983), which presume that the state court decided a federal issue on its merits absent a "plain statement" to the contrary.

Certiorari is also warranted on the question of

whether the Ninth Circuit violated § 2254 by rejecting the state court's factual finding that the Juror No. 6 in this case was biased and by invoking an improbable rule requiring the state to suffer continued service by a juror even if proved to be biased. On this score, the opinion below conflicts with Congress' AEDPA plan and with a long line of this Court's precedents rejecting Ninth Circuit failures to abide by the rules requiring deferential review for both legal and factual questions under § 2254(d) and (e).

Respondent Williams's Brief in Opposition unsuccessfully attempts to minimize the circuit conflict by contrasting the underlying state-court opinions rather than dealing with the Ninth Circuit's and the Eleventh Circuit's irreconcilable holdings on the reach of § 2254(d). See Opp. at 24. And she fails to address whether the Ninth Circuit's grant of relief on the juror-removal claim comported with the deferential-review limits on federal review imposed by § 2254(d) and (e).

I.

A. Respondent argues that "[t]here is no split in authority warranting this Court's intervention[]" and that "[t]his case presents an unremarkable application of *Harrington* v. *Richter*." Opp. at 10. But she misses the point. Instead of addressing the conflicting holdings of the Ninth and Eleventh Circuits on the federal § 2254(d) question of *Richter's* merits-adjudication presumption, she instead contrasts the underlying state-court decisions and state-law procedures. Thus, respondent asserts that the *Richter* presumption "could not be overcome" in *Childers* because the state court's concurring and dissenting judges indeed had referred to this Court's pertinent precedents. Opp. at 13-14. But the Eleventh Circuit crafted no such rule. Instead, it held that *Richter's* presumption could be overcome only if "the state court clearly states that its decision was based solely on a state procedural rule[.]" *Childers*, 642 F.3d at 968-69; see *id.* at n.16.

Pointing out that California law requires explained appellate decisions whereas Florida law does not, respondent further argues that, where explained opinions are required, *Richter's* presumption is either inapplicable or is at least overcome if the state court "fail[s] to expressly address a federal claim" because such a failure "strongly suggests that [the claim] simply was not considered." Opp. at 16-20. But, again, the Eleventh Circuit did not premise its § 2254(d) holding on whether Florida law had required an explained opinion. Moreover, respondent provides no explanation for why a state court that "take[s] the time to issue reasoned decisions" (Opp. at 18) even when not required to do so—like the Florida state appellate court in *Childers* (see *Childers* v. *State*, 936 So. 2d 585 (Fla. Dist. Ct. App. 2006))—should be deemed not to have overlooked an unaddressed federal claim, while the same would not hold true for states that require explained decisions.

Respondent also fails to address the Ninth Circuit's conflict with the Eighth Circuit's *Cox* decision. For the Eighth Circuit, the pertinent question is not whether the state court "explicitly discussed" the federal question but whether the "decision" contradicts this Court's precedents. *Cox*, 398 F.3d at 1029-30.

B. Nor can respondent's and the Ninth Circuit's negative-inference approach—that silence on the federal aspect of a claim rebuts the *Richter* presumption of a merits adjudication—be squared with this Court's "plain statement" rule requiring the habeas court to presume that a state court decided a federal issue on its merits unless the state court "'clearly and expressly'" states that its decision is based on "'bona fide separate, adequate, and independent state law grounds.'" *Coleman*, 501 U.S. at 733 (quoting *Long*, 463 U.S. at 1041).

Richter, it is true, stated that "the presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct at 785. But there was no basis for that inference here.

Instead, the Ninth Circuit's approach largely depended on the invalid supposition that the state court had simply failed to abide by its duty to consider federal claims properly presented to it. Moreover, the Ninth Circuit gave no significant weight to the fact that the California Court of Appeal, in rejecting respondent's successive state habeas corpus petition presenting his federal constitutional juror-removal claim, explained in this case that it already had rejected that claim in respondent's state-court appeal. See Pet. App. at 81a.

C. It is true that the opinion below acknowledged an exception where the state court in rejecting the claim in any event relied on a rule that comported with the federal constitution. (Pet. App. at 25a-26a (citing *Baker* v. *Blaine*, 221 F.3d 1108, 1112 (9th Cir. 2000)). But this "exception" is an illusory one that merely begs the § 2254(d) question. For it permits the Ninth Circuit to judge the state court's ruling against its own view of federal law rather than deferentially judging whether it was "contrary to" federal law as "clearly established" only by the strict holdings of this Court's precedents. Cf. *Bey* v. *Bagley*, 500 F.3d 514, 520 (6th Cir. 2007) (AEDPA deference where state court's inquiry into the state-law claim bore "'some similarity'" to the federal constitutional claim).

Indeed, the Ninth Circuit withheld deferential review here even though the state appellate court expressly considered how juror impartiality is assessed for "federal constitutional purposes" and relied on California judicial opinions quoting this Court's precedents for their explanation of the Sixth Amendment right to an impartial jury—the only Sixth Amendment claim that respondent Williams arguably could have possessed. See *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). Pet. App. at 104a. Similarly, the Ninth Circuit refused to defer under § 2254(d) even though respondent had presented to the California Court of Appeal a Sixth Amendment "unanimous jury" claim that was entirely dependent on her state-law claim. For, as

she argued it to the state appellate court, it was precisely the alleged denial of her state-law right that violated her federal constitutional right. Williams Cal. Ct. App. AOB at 9, 41-42; cf. *Brown* v. *Bobby*, 656 F.3d 325, 329 (6th Cir. 2011) (*Richter* presumption not overcome where state court applied its own speedy-trial limit, but mentioned the Sixth Amendment and regarded state law "as an implementation of the federal constitutional guarantee to a speedy trial"), pet. for cert. filed (Dec. 28, 2011) (No. 11-807); *Clements* v. *Clarke*, 592 F.3d 45, 53-55 (1st Cir.), cert. denied, 130 S. Ct. 3475 (2010).

Even if the state appellate court had not expressly stated that it considered the "federal constitutional principles" when holding that the juror was properly removed, it still should be recognized as having adjudicated the federal constitutional version of the juror-removal claim. It does not matter "whether or not the state court reveals which of the elements in a multipart claim it found insufficient" because the relevant question is whether a "'claim,' not a component of one, has been adjudicated." *Richter*, 131 S. Ct. at 784. Under *Richter*, the state appellate court here adjudicated the whole of her claim.

D. Adopting respondent's view of *Richter* would result, further, in inconsistent application of 2254(d): states requiring an explained decision under their own law would be held to a higher federal standard than those not requiring explained decisions. That would undermine comity, *Wright* v. *Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002); would anomalously frustrate Congress' § 2254(d) plan, *Childers*, 642 F.3d at 968; would discourage states from requiring their courts to issue explained opinions; and would perversely reward state prisoners who obscure their federal claims in their state court pleadings by freeing their claims from later § 2254(d) deferential-review restraints.

* * *

The Ninth Circuit's decision has exerted an immediate and pervasive impact on the state's ability to protect its state-court convictions under § 2254(d). See, e.g., *Williams* v. *Adams*, 2011 WL 3605314, *2 n.1 (9th Cir. Aug. 17, 2011) (citing *Williams* to find that § 2254(d) deference did not apply); *Cox* v. *McEwen*, 2011 WL 6107874, *9 (C.D. Cal. Nov. 15, 2011) (same); *Zumaya* v. *McDonald*, 2011 WL 6742525, *3-4 (C.D. Cal. Nov. 1, 2011) (same); *Suarez* v. *Hedgpeth*, 2011 WL 5909891, *2 (C.D. Cal. Oct. 28, 2011) (same); *Pinckney* v. *Junious*, 2011 WL 4625685, *1 (C.D. Cal. Oct. 5, 2011) (same); *Martinez* v. *Harrington*, 2011 WL 4404119, *4 (C.D. Cal. Aug. 30, 2011) (same); *Bell* v. *Uribe*, 2011 WL 4481485, *10-11 (C.D. Cal. Aug. 8, 2011) (granting relief in light of *Williams*), adopted *sub nom. Bell* v. *Junious*, 2011 WL 4481394, *1 (C.D. Cal. Sept. 24, 2011). Certiorari is warranted on this "adjudication on the merits" question.[1]

---

[1] Respondent also asserts that the absence of dissenting opinions within the Ninth Circuit counsels denying certiorari on the adjudication question. But unanimity within the Ninth Circuit does not diminish, and could only solidify, the inter-circuit conflict between the Ninth Circuit and the Eleventh and other circuits that justifies certiorari in this case. In any event, this Court indeed has granted certiorari in other § 2254(d)-deference cases arising from the Ninth Circuit without regard to the presence of dissenting opinions in the underlying circuit-court decision. E.g., *Cavazos* v. *Smith*, 132 S. Ct. 2 (2011) (*per curiam*) (reversing *Smith* v. *Mitchell*, 624 F.3d 1235 (9th Cir. 2010)); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (*per curiam*) (reversing 389 Fed. Appx. 640 (9th Cir. 2010)); *Patrick* v. *Smith*, 130 S. Ct. 1134 (2010) (vacating *Smith* v. *Patrick*, 508 F.3d 1256 (9th Cir. 2007)); *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008) (*per curiam*) (vacating *Pulido* v. *Chrones*, 487 F.3d 669 (9th Cir. 2007)); *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004) (reversing *Alvarado* v. *Hickman*, 316 F.3d 841 (9th 2002), as amended).

II.

Certiorari is also warranted as to the second issue presented in the petition—whether the Ninth Circuit violated the habeas corpus statute (a) by rejecting the state court's finding of juror bias, where supported by the evidence, because the Ninth Circuit disagreed with the reasoning of the state court and (b) by in any event requiring the state to suffer the presence of a biased juror, even if proved to be so, in the name of the Sixth Amendment's right to an impartial jury. Rather than addressing apparent fundamental problems with the Ninth Circuit's decision, however, respondent Williams merely summarizes the Ninth Circuit's rationale. See Opp. at 24-32.

A. The Ninth Circuit held that—even presuming the correctness of the state court's factual findings that Juror No. 6 was biased (see Pet. App. at 102a (state trial court's factual finding of bias))—the juror's dismissal violated the Sixth Amendment because a "'reasonable possibility'" existed that the "'impetus'" for the dismissal "'stem[med] from the juror's views on the merits of the case.'" Pet. App. at 39a. Respondent, however, does not explain how the Sixth Amendment could ever preclude removal of an actually biased juror—or how federal law "clearly established" by this Court's decisions, as required under § 2254(d), could preclude it. See Pet. at 23-26.

There are multiple problems with the Ninth Circuit's approach. The panel applied intermediate-court law—under *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999)—rather than only this Court's holdings. It applied a test—under *Brewer* v. *Hall*, 378 F.3d 952, 957 (9th Cir. 2004)—that is not constitutionally based. The *Symington* test invoked by the panel protects only a federal criminal defendant's constitutional right to a unanimous jury, and not any such right of a state criminal defendant such as respondent Williams. *Apodaca* v. *Oregon*, 406 U.S. 404 (1972); *Johnson* v. *Louisiana*, 406 U.S. 356 (1972). Not to mention the incongruity of holding that removal of a *biased* juror could violate

the Sixth Amendment.

B. Nor does respondent explain why the Ninth Circuit did not violate the habeas statute when it overturned the trial court's bias finding, otherwise supported by the state-court record, by rejecting the cited "reasons" or "bases" for that finding. See Pet. at 26-29. The state court's decision was entitled to deference under § 2254(d)(2) to the extent it was supported by objectively reasonable fact-finding; the trial court's bias finding was a factual determination involving witness credibility, that also was entitled to "special deference" as a practical matter, and, under § 2254(e)(1), was entitled to a presumption of correctness that could be overcome only by clear and convincing contrary evidence. See *Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985); *Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984). In quibbling with state court's explanations for its factual finding, the Ninth Circuit circumvented the only relevant question: whether the factual finding was rationally supported by the state record as opposed to being refuted by "clear and convincing evidence" to the contrary, § 2254(e)(1). In effect, the Ninth Circuit read back into the habeas corpus statute's rules of deferential review for state court fact-finding the same kind of previous statutory exceptions that AEDPA deleted from the scheme.

Here, the state-court record amply supported the trial court's finding of bias. Most of the jurors stated that Juror No. 6 had expressed an unwillingness to follow the law, with two noting that he added words to the instructions. Four jurors asserted that Juror No. 6 had been using a higher standard of proof, which was described as a "no doubt" standard, and many reported that he disagreed with California's vicarious-liability and felony-murder rules. While the foreman initially reported that Juror No. 6 expressed that he believed there was insufficient evidence, the foreman explained that the charge's severity influenced Juror No. 6's interpretation of the evidence and his use of a "beyond reason" standard. See Pet. at 4-5; Pet. App. 104a; RT 1251, 1267-68.

Rationally, this supported the factual finding of bias—that his views prevented or substantially impaired the performance of his juror duties "in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424. That should have been the end of the matter on the juror-bias question in this case. The Ninth Circuit's disregard for the state court's rationally-supported factual finding involving a credibility determination warrants this Court's intervention. See, e.g., *Jackson*, 131 S. Ct. 1305; *Rice* v. *Collins*, 546 U.S. 333 (2006).[2]

* * *

---

[2] Respondent suggests *Jackson* and *Collins* are inapplicable because they are limited to *Batson* claims. Opp. at 28. Nothing in these cases suggests their procedural rule should be narrowly applied to a particular type of substantive claim. See, e.g., *Hill* v. *Tilton*, 384 Fed. Appx. 639, 641 (9th Cir. 2010) (ineffective-assistance-of-counsel case quoting *Collins* for deference owed to state-court credibility determinations).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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JANUARY 4, 2012

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JOINT APPENDIX

RECORD AND BRIEFS

No. 11-465

Supreme Court, U.S.
FILED
MAR 9 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed October 10, 2011
Writ Of Certiorari Granted January 13, 2012

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RELEVANT DOCKET ENTRIES
FOR CALIFORNIA COURT OF APPEAL
CASE NO. B137365
The People v. Williams et al.

Date	Description	Notes
12/10/1999	Notice of appeal lodged/received (criminal).	11-23-99 Williams
12/10/1999	Notice of appeal lodged/received (criminal).	11-30-99 Taylor
12/27/1999	Counsel appointment order filed.	Rosen for Williams
12/27/1999	Counsel appointment order filed.	Christiansen for Taylor
05/01/2000	Appellant's opening brief.	Defendant and Appellant: Williams, Tara Sheneva Attorney: Bruce D. Rosen --- Attorney: Rosen, Bruce D. Party: Williams, Tara
05/24/2000	Appellant's opening brief.	Defendant and Appellant: Taylor, Carde Keishon Attorney: Mark Christiansen --- Attorney: Christiansen, Mark Party: Taylor, Carde

09/21/2000	Respondent's brief.	Plaintiff and Respondent: The People Attorney: Office of the Attorney General --- Attorney: Office of the Attorney General Party: The People
10/02/2000	Appellant's reply brief.	Defendant and Appellant: Williams, Tara Sheneva Attorney: Bruce D. Rosen --- Attorney: Rosen, Bruce D. Party: Williams, Tara
10/12/2000	Appellant's reply brief.	Defendant and Appellant: Taylor, Carde Keishon Attorney: Mark Christiansen --- Attorney: Christiansen, Mark Party: Taylor, Carde
10/12/2000	Case fully briefed.	
01/17/2001	Argument waived, cause submitted.	
03/27/2001	Opinion filed	K-C-A aff in part,rev in part, and remanded as Taylor. Aff as to Willimas/29 pages (nfp)

05/08/2001	Petition for review in Supreme Court received.	1x6"record sent to S.F. rpr 5-7-01
06/21/2001	Ext. by Supreme Court re: petition for hearing filed:	
06/29/2001	Record transmitted to Supreme Court.	sent rem. 1 x 6 record to s.f. per rpr
07/11/2001	Petition for review denied in Supreme Court.	
07/11/2001	Petition for review granted in Supreme Court.	cause transferred to ct of appeal, 2nd aplt dist, div 3 w/directions to vacate opin & to reconsider in lite of p.v. cleveland
07/30/2001	Note:	record transferred from supreme ct per their order of 7-11
08/16/2001	Order filed.	this ct request spb filed by 9-17-01 addressing the effect of the p. v. cleveland (2001)25Cal.4th 466 on this case. (k)

08/27/2001	Supplemental brief filed by:	[*]Plaintiff and Respondent: The People Attorney: Office of the Attorney General Defendant and Appellant: Williams, Tara Sheneva Attorney: Bruce D. Rosen Defendant and Appellant: Taylor, Carde Keishon Attorney: Mark Christiansen ---------- Attorney: Christiansen, Mark Party: Taylor, Carde Attorney: Rosen, Bruce D. Party: Williams, Tara Attorney: Office of the Attorney General Party: The People

---

* This docket entry appears to be erroneous because the supplemental letter briefs filed by Williams and the California Attorney General bear later dates (September 15, 2001, and September 17, 2001, respectively). The next two docket entries show that both of those letter briefs were filed on September 17, 2001. Thus, this August 27, 2001, entry is apparently for an August 22, 2001 letter sent by co-appellant Carde Taylor's counsel, noting that the supplemental briefing issue did not involve Taylor because she had a separate jury.

09/17/2001	Supplemental brief filed by:	Defendant and Appellant: Williams, Tara Sheneva Attorney: Bruce D. Rosen --- Attorney: Rosen, Bruce D. Party: Williams, Tara
09/17/2001	Supplemental brief filed by:	Plaintiff and Respondent: The People Attorney: Office of the Attorney General --- Attorney: Office of the Attorney General Party: The People
11/19/2001	Cause submitted.	per rule 22.5(c)
01/18/2002	Opinion filed.	As to Taylor, judgment is aff. in part, rev. in part & remanded As to Williams judgment is affirmed. K,C,A 29pgs. Nfp
02/04/2002	Mail returned.	opinion Williams
02/25/2002	Petition for review in Supreme Court received.	
02/27/2002	Record transmitted to Supreme Court.	1x6"
02/28/2002	Mail re-sent to:	Opinion

04/19/2002	Record returned from Supreme Court.	rcvd 1 x 6 record from s.f.
05/02/2002	Remittitur issued.	
05/02/2002	Case complete.	

DOCKET ENTRIES FOR CALIFORNIA SUPREME COURT CASE NO. S104661

Date	Description	Notes
02/25/2002	Petition for review filed	appellant Tara S. Williams
02/27/2002	Received Court of Appeal record	1 doghouse
04/10/2002	Petition for review denied	Kennard, J., is of the opinion the petition should be granted. George, CJ., was absent and did not participate.

DOCKET ENTRIES FOR
CALIFORNIA COURT OF APPEAL
CASE NO. B170245
Williams v. The People et al.

Date	Description	Notes
09/26/2003	Petition for a writ of habeas corpus filed.	
10/14/2003	Order denying petition filed.	k-c-a
10/14/2003	Case complete.	
01/14/2008	Record in Box #	360392053

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA 2:03-cv-02691-GW-VBK

Date Filed	No.	Docket Text
04/16/2003	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Tara Sheneva Williams in State Custody referred to Magistrate Judge Victor B. Kenton . (jag) (Entered: 04/21/2003)
04/23/2003	3	ORDER REQUIRING RESPONSE TO PETITION by Magistrate Judge Victor B. Kenton: If respondent contends that the petition can be decided without the Court reaching the merits of petitioner's claims, respondent shall file a motion to dismiss within 30 days of the date of this Order. If respondent files a motion to dismiss, petitioner shall file his opposition, if any, to the motion within 20 days of the date of service thereof. If respondent does not contend that the petition can be decided without the Court reaching the merits of petitioner's claims, respondent shall file and serve an answer to petition within 45 days of the date of this Order. Petitioner may file a single traverse responding to matters raised in the answer within 30 days of the date of service thereof. Unless otherwise ordered by the Court, this case shall be deemed submitted on the day

		following the date petitioner's opposition to a motion to dismiss and/or traverse is due. (gk) (Entered: 04/24/2003)
06/13/2003	9	MOTION by respondent Gwendolyn Mitchell to dismiss petitioner for writ of habeas corpus ; memorandum of points and authorities. (gk) (Entered: 06/16/2003)
06/13/2003	10	NOTICE by respondent Gwendolyn Mitchell of lodging. Lodged documents. (gk) (Entered: 06/16/2003)
06/19/2003	11	MINUTES by Magistrate Judge Victor B. Kenton: Petitioner is ORDERED to advise the Court, by no later than 7/17/03, whether she wishes to exhaust her claims and request a stay or she should file an opposition to the motion to dismiss. CR: n/a. (gk) (Entered: 06/23/2003)
07/21/2003	13	MOTION by petitioner Tara Sheneva Williams to request for dismissal without prejudice of unexhausted claims . (gk) (Entered: 07/25/2003)
07/24/2003	14	MINUTES: IN CHAMBERS; granting motion for dismissal without prejudice of unexhausted claims [13-1]/ motion to request motion for stay of petition pending exhaustion of State remedies as to unexhausted claims; petitioner is to provide the Court with an update on the status of the pending state habeas petition every 30 days by Magistrate Judge Victor Kenton CR: n/a (ab) (Entered: 07/28/2003)

12/07/2004	44	MINUTES (In Chambers) before Judge Victor B. Kenton : The Court is in receipt of Petitioner's Motion to update the Court on the Status of his State Writ. In this document, Petitioner attached an order from the California Supreme Court denying Petitioner's habeas petition. The Court Hereby Orders Petitioner to file a First Amended Petition within 30 days of the date of this minute order. Respondent will then have 30 days thereafter to file an Answer addressing the merits of the claims raised in the First Amended Petition. Petitioner will then have 30 days thereafter to file a Reply. (rh,) (Entered: 12/08/2004)
10/18/2005	54	Substitution of Attorney filed. Substituting attorney James Francis Tritt for Petitioner Tara Sheneva Williams, in pro se, by Magistrate Judge Victor B. Kenton.(gk,) (Entered: 10/19/2005)
11/14/2005	57	FIRST AMENDED PETITON FOR WRIT OF HABEAS CORPUS against Respondent Gwendolyn Mitchell, amending Petition for Writ of Habeas Corpus 1, filed by Petitioner Tara Sheneva Williams. (gk,) (Entered: 11/16/2005)

11/15/2005	56	MINUTES OF IN CHAMBERS ORDER by Judge Victor B. Kenton : The Court is in receipt of Petitioner's First Amended Petition for Writ of Habeas Corpus by a Person in State Custody. In the 1st Amended Petition, Petitioner lists only one ground for relief: (1) the trial court erred in its dismissal of the lone holdout juror. The court notes that Petitioner raised 13 grounds for relief in her original Petition. The Court HEREBY GRANTS Petitioner leave to file a 2nd Amended Petition raising all exhausted grounds for relief contained in the original Petition and 1st Amended Petition within 30 days of the date of this minute order. The Court will not consider any claims not listed in the 2nd Amended Petition. (rh,) (Entered: 11/15/2005)
01/20/2006	61	SUPPLEMENTAL MEMORANDUM of Points and Authorities in Support filed by Petitioner Tara Sheneva Williams of Petition for Writ of Habeas Corpus by a Person in State Custody 57 . (gk,) (Entered: 01/30/2006)
01/23/2006	60	MINUTES OF IN CHAMBERS ORDER by Judge Victor B. Kenton : The Court is in receipt of Petitioner's Supplemental Memorandum Points and Authorities in Support of Petition for Writ of Habeas Corpus by a Person in State Custody. The Court HEREBY ORDERS Respondent to

		file an Answer within 30 days of the date of this Minute Order addressing the merits of the claims contained in the First Amended Petition and Supplemental Memorandum of Points and Authorities in Support. (rh,) (Entered: 01/24/2006)
05/17/2006	70	ANSWER to First Amended Petition and Supplemental Memorandum of Points and Authorities in Support 57 filed by Respondent Debra Jacquez; memorandum of points and authorities. ["Petitioner is incarcerated at the Central California Women's Facility in Chowchilla, CA, where Debra Jacquez is the acting warden. Accordingly, Acting Warden Jacquez should be substituted as Respondent. F.R.Civ.P. 25(d)(1)"](gk,) (Entered: 05/18/2006)
05/17/2006	71	NOTICE of lodging documents 13 through 22 filed by respondent Debra Jacquez. (bp,) (Entered: 05/25/2006)
09/25/2006	79	TRAVERSE filed by Petitioner Tara Sheneva Williams. (rh,) (Entered: 09/27/2006)
03/19/2007	83	REPORT AND RECOMMENDATION issued by Magistrate Judge Victor B. Kenton. Re Petition for Writ of Habeas Corpus 1 (rh,) (Entered: 03/19/2007)

04/02/2007	84	PETITIONER'S OBJECTION to Report and Recommendation (Issued) 83 and proposed orders and points and authorities in support thereof filed by Petitioner Tara Sheneva Williams.(shb,) (Entered: 04/03/2007)
05/30/2007	86	ORDER (1) ACCEPTING AND ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, AND (2) DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS by Judge George P. Schiavelli: Ordered that (1) the Court accepts and adopts the Report and Recommendation 83, and (2) Judgment shall be entered dismissing the First Amended Petition with prejudice. (gk,) (Entered: 05/31/2007)
05/30/2007	87	JUDGMENT by Judge George P. Schiavelli: Adjudged that the First Amended Petition for Writ of Habeas Corpus 57 is dismissed with prejudice. (MD JS-6, Case Terminated).(gk,) (Entered: 05/31/2007)
06/27/2007	88	NOTICE OF APPEAL to 9th CCA filed by petitioner Tara Sheneva Williams. Appeal of Judgment 87 . Filed On: 5/30/2007; Entered On: 5/31/2007; Certificate of Appealability Pending. cc: Tara Sheveva vs Williams; State Attorney General (dmap) (Entered: 06/28/2007)

06/28/2007		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: Appeal to 9th Circuit Court of Appeals 88 (dmap) (Entered: 06/28/2007)
08/08/2007	91	Order by Judge George H Wu denying the certificate of Appealability re: Appeal to 9th Circuit Court of Appeals 88 . (dmap) (Entered: 08/09/2007)
08/29/2008	96	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 88 filed by Tara Sheneva Williams, CCA # 07-56127. The motion to proceed in forma pauperis is granted. The Clerk shall amend the docket to reflect this status. The motion of James Francis Tritt, Esq., for leave to withdraw as retained counsel of record is granted. Appellant's motion for appointment of counsel in this habeas corpus appeal is granted. Counsel will be appointed by separate order. The Clerk shall serve a copy of this order by facsimile transmission on Sean K. Kennedy, Federal Public Defender [FAX: (213) 894-5005), who will locate appointed counsel. Mr. Kennedy may wish to consider that former retained trial counsel Tritt is willing to accept the appointment. The district court shall provide this court with the name and address of appointed counsel by facsimile transmission [FAX: (415) 355-8111) within 14 days of locating counsel. The opening brief and excepts of

		record are due 10/30/08. The briefing schedule has been set. Order received in this district on 8/29/08. (car) (Entered: 09/03/2008)
02/11/2010	99	RECORD ON APPEAL sent to Circuit Court re: Appeal number, 07-56127 Record consists of 2 volumes, 1 Box of State Lodged Documents. re Notice of Appeal to 9th Circuit Court of Appeals 88 (lr) (Entered: 02/11/2010)
07/13/2011	101	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 88 filed by Tara Sheneva Williams, CCA # 07-56127. Order received in this district on 7/13/11. The petition for rehearing and suggestion for rehearing en banc are denied. (cbr) (Entered: 07/19/2011)
07/14/2011	105	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 88 filed by Tara Sheneva Williams, CCA # 07-56127. Respondent-Appellee's motion for a 90 day stay of the issuance of the mandate pending application for writ of certiorari is granted. The mandate is stayed for 90 days pending Respondent-Appellee's filing of a petition for writ of certiorari in the Supreme Court. Order received in this district on 7/14/11. (car) (Entered: 07/20/2011)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
07-56127

Date Filed	No.	Docket Text
08/13/2007	1	Filed request for a certificate of appealability. Date COA denied in DC: 8/8/07 Record on Appeal included (y/n): y (STAFFATT) (BG)
08/13/2007	2	Received District Court case file in (2) TWO ORIG. VOLS. & (3) THREE BROWN FOLDERS (RECORDS UNIT) (BG)
08/13/2007	3	Received certificate of record. RT filed in DC None requested. [07-56127] (BG)
05/27/2008	4	Filed order (ALEX KOZINSKI and JAY S. BYBEE) Granting the request for a COA. Within 21 days of the filing date of this order, appellant shall either: (1) pay to the district court the $455.00 filing and docketing fees for this appeal and file in this court proof of such payment; or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed CJA Form 23. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. If appellant pays the fees, the following briefing schedule shall apply: Opening brief due 08/20/2008. Answering brief due 09/19/2008. The optional reply brief

		is due within 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion. (DMM)
06/17/2008	5	Filed Appellant Tara Sheneva Wiliams motion to proceed In Forma Pauperis, for appointment of counsel. Served on 06/13/2008. (CW)
08/29/2008	6	Filed order (Appellate Commissioner) The motion to proceed in forma pauperis is granted. The Clerk shall amend the docket to reflect this status. The motion of James Francis Tritt, Esq., for leave to withdraw as retained counsel of record is granted. Appellant's motion for appointment of counsel in this habeas corpus appeal is granted. See 18 U.S.C. § 3006A(a)(2)(B); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam). Counsel will be appointed by separate order. The Clerk shall serve a copy of this order by facsimile transmission on Sean K. Kennedy, Federal Public Defender, 321 East Second Street, Los Angeles, California 90012-4206 (FAX: (213) 894-5005), who will locate appointed counsel. Mr. Kennedy may wish to consider that former retained trial counsel Tritt is willing to accept the appointment. The district court shall provide this court with the name and address of appointed counsel by facsimile transmission (FAX: (415)

		355-8111) within 14 days of locating counsel. If new counsel identifies uncertified issues that should be raised on appeal, counsel shall include them in the opening brief as permitted by Ninth Circuit Rule 22-1(e). The opening brief and excerpts of record are due October 30, 2008; the answering brief is due December 1, 2008; and the optional reply brief is due within 14 days after service of the answering brief. (MOATT) (DL)
09/04/2008	8	Received Notice of Appearance of Heather R. Rogers, Esq., as CJA counsel of record for petitioner. (DL)
12/15/2008	11	Filed original and 15 copies of Appellant Tara Sheneva Williams (Informal: No) opening brief of 58 pages. Five copies Excerpts of record in 2 volumes. Served on 12/11/2008. (GLS)
05/06/2009	20	Filed (ECF) Appellant Tara Sheneva Williams Motion for appointment of counsel, Motion to substitute counsel, Motion to withdraw as counsel. Date of service: 05/06/2009. [6910209] (HRR)
05/15/2009	21	Submitted (ECF) Answering brief for review. Submitted by Appellee Debra Jacquez. Date of service: 05/15/2009. [6922669] (SB)
05/18/2009		Filed clerk order: Answering Brief [21] filed by Debra Jacquez. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a

		Red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. (PK)
05/20/2009	23	Received 10 paper copies of Answering brief [21] filed by Debra Jacquez in 07-56127. One copy to Case Files, the remainder to Records. (SD)
07/20/2009	24	Filed order (Appellate Commissioner) The motion of Heather Rogers, Esq., for leave to withdraw as appointed counsel of record is granted. Substitute counsel will be appointed by separate order. The Clerk shall electronically serve this order on the appointing authority for the Central District of California, who will locate appointed counsel. The district court shall send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel. The opening brief and answering briefs have been received. Appellant's motion to extend time to file the reply brief is granted. The reply is due on or before August 4, 2009. (MOATT) [6996995] (DL)
07/22/2009	26	Received Notice of Appearance of Kurt David Hermansen, Esq., as CJA counsel of record for petitioner. [7000507] (DL)
09/25/2009	32	Submitted (ECF) Reply brief for review. Submitted by Appellant Tara

		Sheneva Williams. Date of service: 09/25/2009. [7075672] (KDH)
09/28/2009	33	Filed clerk order: Reply Brief [32] filed by Tara Sheneva Williams. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Grey cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7076140] (PK)
10/01/2009	34	Received 10 paper copies of Reply brief [32] filed by Tara Sheneva Williams in 07-56127. One copy to Case Files, the remainder to Records. [7082515] (SD)
02/22/2010	35	FILED (ORIGINAL) CERTIFIED RECORD ON APPEAL. Record Part: Clerks Record, No. of Volumes: 2, Sealed: n; Record Part: State Lodged Docs, No. of Volumes: 3 Expandos, Sealed: n. [7239744] (JAS)
08/02/2010	38	ARGUED AND SUBMITTED TO ALEX KOZINSKI, STEPHEN R. REINHARDT and RONALD M. WHYTE. [7425613] (LN)
08/04/2010	39	Filed (ECF) Appellee Debra Jacquez. Correspondence: Notice To Substitute Respondent. Date of service: 08/04/2010. [7428284] – [COURT UPDATE: corrected docket text and event to reflect content of filing. Resent notice. 08/04/2010 by MS] (SB)

08/05/2010	40	Appellee Debra Jacquez in 07-56127 substituted by Appellee Javier Cavazos in 07-56127 [7428923] (CW)
05/23/2011	41	FILED OPINION (ALEX KOZINSKI, STEPHEN R. REINHARDT and RONALD M. WHYTE) REVERSED AND REMANDED. Judge: SR Authoring, FILED AND ENTERED JUDGMENT. [7760414] (RP)
06/01/2011	42	Filed (ECF) Appellee Javier Cavazos Motion to extend time to file petition for rehearing until 06/20/2011. Date of service: 06/01/2011. [7770181] (SB)
06/02/2011	43	Filed clerk order (Deputy Clerk: sw): Appelle motion to extend time to file petition for rehearing until 06/20/2011. Petition for rehearing is due 06/20/2011. [7771659] (SW)
06/17/2011	44	Filed (ECF) Appellee Javier Cavazos petition for panel rehearing and petition for rehearing en banc (from 05/23/2011 opinion). Date of service: 06/17/2011. [7789611] (SB)
07/13/2011	45	Filed order (ALEX KOZINSKI, STEPHEN R. REINHARDT and RONALD M. WHYTE) The panel has voted unanimously to deny the petition for rehearing. Chief Judge Kozinski and Judge Reinhardt have voted to deny the suggestion for rehearing en banc, and Judge Whyte so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge has

		requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and suggestion for rehearing en banc are denied. [7819025] (BJB)
07/14/2011	46	Filed (ECF) Appellee Javier Cavazos Motion to stay the mandate. Date of service: 07/14/2011. [7820112] (SB)
07/14/2011	47	Filed order (STEPHEN R. REINHARDT) Respondent-Appellee's motion for a ninety-day stay of the issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41(d)(2). The mandate is stayed for ninety days pending Respondent-Appellee's filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court. [7820925] (BJB)
10/18/2011	50	Received notice from the Supreme Court: petition for certiorari filed on 10/10/2011 and placed on the docket 10/13/11. Supreme Court Number 11-465. [7932141] (RR)
01/17/2012	51	Received Supreme Court order dated 01/13/2012. The motion of respondent for leave to proceed IFP is GRANTED. The petition for a writ of certiorari is granted LIMITED to Question 1 presented by the petition. [8034190] (RR)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. **TARA S. WILLIAMS,** *Defendant and Appellant.*	B137365 NA039425

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

Honorable Richard R. Romero

APPELLANT'S OPENING BRIEF

(Filed May 1, 2000)

Law Offices Of
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Attorneys for Appellant

* * *

I

THE COURT ABUSED ITS DISCRETION IN DISCHARGING THE LONE HOLDOUT JUROR BECAUSE ALL THE FACTS AND CIRCUMSTANCES REVEAL THERE WAS NO "SUBSTANTIAL EVIDENCE" ESTABLISHING "ACTUAL BIAS" AND HIS INABILITY TO PERFORM HIS DUTIES AS A "DEMONSTRABLE REALITY" AND HIS VOTE WAS THE RESULT OF HIS BELIEF THE PEOPLE FAILED TO PROVE GUILT BEYOND A REASONABLE DOUBT

Over appellant's objections that the court could not inquire further after initial inquiry revealed no misconduct was committed and nothing elicited during the initial and subsequent inquiries[1] demonstrated he was unable or unwilling to perform his duties as a juror,[2] the court discharged Juror No. 6. In so doing, the court stated:

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[1] The relevant excerpts from the questioning of the juror is fully and completely set forth below. (See "The Initial Inquiry" and "The Questioning Of The Other Jurors," infra.)

[2] There is no doubt that the court has the power to replace an original juror with an alternate upon finding that the juror is "unable to perform his duty." (Pen. Code, § 1089; see Code Civ. Proc., § 233.) Whether the circumstances of a given case present grounds sufficient to warrant removal is a question entrusted to the court's sound discretion and its finding on that issue will be sustained if supported by "substantial evidence." (**People** v. **Johnson** (1993) 6 Cal.4th 1, 21.) "Substantial evidence" is evidence "of ponderable legal significance, evidence that is reasonable, credible and of solid value," it is not synonymous with "any" evidence and instead is "substantial" proof of the

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"I'm going to dismiss the juror, but **not because he's not deliberating and not because he's not following the law**. [¶] I think it's somewhat questionable whether he is deliberating or not. [¶] One juror said apparently he was doodling a lot and had his back to the board, but he did respond to questions when pushed and did present at least to the other jurors an intelligible reason for his position. [¶] But it's fairly debatable whether he was deliberating or not, so I'm not taking that into account. That is not a basis for dismissal. [¶] Not following the law is not a basis for his dismissal either, since there was a request by him to have the law clarified. It was clarified for him. [¶] **He is dismissed without any question in my mind as a biased juror.** His bias is shown in a number of ways, by the fact that he **added his own words to the court's instructions** as to what the law is. That indicates where his mind is bent towards and that is biased against the prosecution in the matter. [¶] His **repeating of the severity of the charge in conjunction with his bringing up the subject of juror nullification** establishes his state of mind that he's bent in that regard, that he's concerned about the severity of the charge, with means the severity of the punishment. They really

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essentials the law requires and the focus is on the quality, not quantity, of the evidence. (**Roddenberry** v. **Roddenberry** (1996) 44 Cal.App.4th 634, 651.)

> are interchangeable in this context. [¶] When he talks about evidence and the severity of the charge and burden of proof. When I asked him what burden of proof he was relying on, **he said it was a very, very convinced beyond a reasonable doubt**. [¶] Clearly, from the evidence presented here that it's higher than beyond a reasonable doubt because the charge is murder. [¶] He also **disagrees with the felony murder rule**. That's clear from the juror's response. [¶] **He's dishonest to me** in stating that no juror including himself had discussed the severity of the charge, had not discussed juror nullification. [¶] Some jurors didn't hear that. We're not talking about him hearing another juror discuss those issues, it's whether he discussed those issues, and he was **dishonest in court**. [¶] And again, I don't like to do this, but, in my opinion, he was lying in court. He has no business being a juror in this matter, and he is dismissed."

(RT 1359-1361; emphasis added.)

For each of the following reasons, the court clearly and necessarily abused its discretion in discharging Juror No. 6, the lone holdout for acquittal who committed no "serious and willful" misconduct[3]

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[3] Only "serious and wilful" misconduct justifies a court in exercising its discretion to remove a juror. (**People** v. **Daniels** (1991) 52 Cal.3d 815, 863-864; see also **People** v. **Lopez** (1993) 13 Cal.App.4th 1840, 1844 [point of **Daniels** is a "juror's serious and wilful misconduct is good cause to believe the juror will not

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constituting "good cause" to conclude he was unable to perform his functions as a juror as a "demonstrable reality"[4] and instead refused to vote "guilty" simply because he believed the People had failed to prove appellant's guilt beyond a reasonable doubt.[5] (See

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be able to perform his or her duty"].) "Serious and wilful misconduct" is "basically the antithesis of negligence, and that the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute wilful misconduct; conversely an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences, cannot properly be classed as the less culpable conduct which is termed negligence." (**Shell Oil Co.** v. **Winterthur Swiss Ins. Co.** (1993) 12 Cal.App.4th 715, 741, quoting **Mercer-Fraser Co.** v. **Industrial Acc. Com.** (1953) 40 Cal.2d 102, 120.) It follows that a finding of serious and wilful misconduct cannot be sustained "upon proof of mere negligence of any degree." (**Ibid.**)

[4] The court's discretion to remove a deliberating juror is "not unbounded" (**People** v. **Roberts** (1992) 2 Cal.4th 271, 325) and "not unfettered" (**People** v. **Bell** (1998) 61 Cal.App.4th 282, 287). That discretion instead "is limited" in that the juror's inability to perform his functions as a juror "**must appear in the record as a demonstrable reality**." (**People** v. **Collins** (1976) 17 Cal.3d 687, 696, quoting **People** v. **Compton** (1971) 6 Cal.3d 55, 60 (emphasis added); see also **People** v. **Loot** (1998) 63 Cal.App.4th 694, 698, citing **People** v. **Bradford** (1997) 15 Cal.4th 1229, 1351.)

[5] The court requires facts demonstrating the juror failed to carry out his duty as a juror and cannot discharge that juror if it appears the jury's inability to reach a verdict was due instead simply to the juror's legitimate disagreement with the other jurors. (**People** v. **Castorena** (1996) 47 Cal.App.3d 1051, 1066.)

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People v. **Hightower** (2000) 77 Cal.App.4th 1123, 1147 (emphasis added) ["[e]ntertaining a doubt about the sufficiency of the prosecution's case (as distinct from an immutable, categorical hostility to the basic premise of the case) is **not good cause** for removal" and "a trial court commits grievous error if it discharges a juror 'because' that juror entertains such a doubt"].)

The error was necessarily prejudicial because once Juror No. 6 was improperly removed and replaced a jury which had previously been deadlocked proceeded to convict. (**People** v. **Delamora** (1996) 48 Cal.App.4th 1850, 1856.) Appellant was accordingly denied her Sixth Amendment right to a unanimous jury, requiring her conviction to be reversed. Indeed, reaching any other conclusion would be to adopt a

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Indeed, it is an "inarguable proposition" that a juror cannot be removed merely because he or she disagrees with other jurors about the sufficiency of the case against the accused and removal of such a juror without good cause "impermissibly 'load[s] the jury' in favor of one of the parties." (**Hightower, supra**, 77 Cal.App.4th at p. 1147; see also **People** v. **Hamilton** (1963) 60 Cal.2d 105, 128 ["if the record shows (as it does here), that, based on the evidence, the juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side"].) The court's decision to discharge Juror No. 6 must accordingly be assessed in light of the reality "that a juror may **not be removed because he or she disagrees with the other jurors** as to the merits of the case requires no citation" and "removal of the sole holdout for acquittal is an issue at the heart of the trial process and **must be meticulously scrutinized.**" (**United States** v. **Hernandez** (2d Cir. 1988) 862 F. 2d 17, 23; emphasis added.)

perverse rule that a juror who, unlike the others, does not view the evidence adduced and interpret the instructions read in a manner which leads him to convict the accused commits "misconduct" and must be removed.

First, it is clear the initial inquiry of the foreperson after the court received the jury's note[6] revealed Juror No. 6 committed no misconduct and his concerns were solely and exclusive about the insufficiency of the evidence.[7] The matter accordingly should have ended there[8] (see **United States** v. **Brown**

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[6] The court received a note that there was one juror who "has expressed an intention to disregard the law (instruction 6.10.5)" and "has expressed concern relative to the severity of the charge." (CT 207.)

[7] The foreperson informed the court that Juror No. 6 **never** expressed any concern about punishment and it was "probably ten or fifteen times" during deliberations that Juror No. 6 "expressed that he doesn't believe that there's sufficient evidence." (RT 1251.)

[8] **Hightower** recently recognized the question what is the nature and scope of the inquiry a court may or must conduct once it properly undertakes to investigate a suggestion of juror misconduct is "truly difficult" in that "the cases are full of general pronouncements entrusting the matter to the trial court's discretion" and "the court's discretion is limited – in this instance by a body of ambiguous and sometimes conflicting appellate decisions." (**Hightower, supra**, 77 Cal.App.4th at p. 1143.) It noted the **Brown-Thomas-Symington** line of federal cases which effectively bar the court from conducting any inquiry disclosing the contents of jury deliberations by allowing removal "only if the cause for removal indisputably appears without disclosing anything said in deliberations." (**Id.**, at p. 1145.) Although the **Hightower** majority refused to adopt

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(D.C. Cir. 1987) 823 F.2d 591, **United States** v. **Thomas** (2d Cir. 1997) 116 F.3d 606 and **United States** v. **Symington** (9th Cir. 1999) 195 F.3d 1080), particularly given that the prosecutor expressed no concerns whatsoever that the foreperson's answers revealed misconduct, let alone made no request that the court inquire further.

Second, the People's "Motion To Question Juror For Bias" which was filed the next day was based solely on the jury's note, no additional information was brought to the court's attention through the motion and the motion made assertions and allegations which the foreperson's responses had already shown were totally unfounded.[9] The motion accordingly should

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"the presumptive rule" suggested by these federal cases that the court is without power to remove a juror whenever the record raises a "possibility" that a proposal to remove the juror stems from his doubts about the sufficiency of the prosecution's case and instead found "if the record discloses multiple grounds for removing a juror, some permissible and some impermissible, the trial court must be presumed to have acted upon a permissible ground, and not an impermissible one, unless the record shows otherwise," **Hightower** does reiterate the rule that "so long as substantial evidence supports that determination, the trial court's decision will be upheld." (**Id.**, at pp. 1147-1148, and fn. 18.)

[9] Clear from the previous day's inquiry was these assertions were totally unfounded because the foreperson told the court Juror No. 6 **never expressed** any concern about punishment and Juror No. 6 **did not disagree with the law**, but instead he had a legitimate question about one jury instruction which the court had since answered. Accordingly obvious was **on the facts before the court** there was absolutely nothing about which to inquire further, particularly given the foreperson's unequivocal

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have been denied for lack of a factual basis warranting further inquiry.

Third, if inquiry should not have stopped after the initial questioning of the foreperson revealed Juror No. 6 had committed no misconduct and his concerns were solely and exclusively about the People's failure to adduce evidence sufficient to establish appellant's guilt beyond a reasonable doubt,[10] it

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statement that "probably ten or fifteen times" Juror No. 6 had "expressed that he doesn't believe that there's sufficient evidence." (RT 1251.)

[10] **Thomas** effectively foreshadowed the present case when the court considered a hypothetical where "a strong majority of the jury favors conviction, but a small set of jurors – perhaps just one – disagrees" and found:

"The group of jurors favoring conviction may well come to view the 'holdout' or 'holdouts' not only as unreasonable, but as unwilling to follow the court's instructions on the law. The evidentiary standard that we endorse today – that **'if the record evidence discloses <u>any possibility</u> that' a complaint about a juror's conduct 'stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request'** – serves to protect these holdouts from fellow jurors who have come to the conclusion that the holdouts are acting lawlessly."

(**United States** v. **Thomas, supra**, 116 F.3d at p. 622; emphasis added.) This issue is pending in the California Supreme Court in **People v. Rodriguez** (S073219) [65 Cal.App.4th 1156]. Citing **Thomas, Rodriguez** held "because the court's inquiry of Juror No. 2 disclosed that Juror No. 2 had doubts about the sufficiency of the evidence and in fact had voted to acquit appellant, we conclude that the court's discharge of Juror No. 2 violated appellant's right to a unanimous jury verdict" and, because the evidence was "quite clear" that Juror No. 2 was a holdout juror who questioned the sufficiency of the evidence to

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necessarily should have stopped after the foreperson was questioned a second time and conceded it was nothing more than his "belief," "opinion," "feeling" and "leading hypothesis" that Juror No. 6 was acting improperly and Juror No. 6 had made **no explicit statement** supporting the conclusion he was unwilling to follow the law or applying a different standard of proof. (RT 1266-1269, 1273.)

Fourth, if inquiry should not have stopped after the foreperson conceded Juror No. 6 had said absolutely nothing affirmative[11] which could reasonably be characterized as misconduct, inquiry should have stopped after of Juror No. 6 revealed he "never even heard the word 'punishment' used" in deliberations, believed "whether it's first degree murder or not [all criminal trial] should have the same burden of proof," agreed with the reasonable doubt instruction "as I understood it," which was "there's always some possible doubt in any human affair, but if you have a reasonable doubt based on the evidence and only on

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convict, "these circumstances" revealed the court erred in discharging the juror.

[11] This distinguishes the instant case from **People** v. **Thomas** (1990) 218 Cal.App.3d 1477, 1482, 1485, where during deliberations a juror announced she could not accept a police officer's testimony because she firmly believed, based upon personal experience, police officers generally lied, an affirmative statement which demonstrated she "obviously had prejudged the credibility of the police officers who testified at trial and was unable to cast aside her personal bias in weighing the evidence" and accordingly justified the court' s decision to discharge her.

the evidence that was presented at the trial, if you have a reasonable doubt about a defendant's guilt, under the law, you are required to vote not guilty" and believed jurors "should not use juror nullification" and "[t]hey should base their decisions on the evidence that was presented at a particular trial and only on that evidence." (RT 1277-1279.) These answers were not only consistent with those given by the foreperson, they clearly dispelled any suggestion of misconduct.

Fifth, when the court asked Juror No. 6 "have you made reference during deliberations to the severity of the charge," he said "I can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt" and "[o]ther than that, I did not make a reference to the severity of the case – the severity of the charge." (RT 1280.) Similarly, when the court asked him to explain what he meant by "very convinced," Juror No. 6 answered "it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced – if the verdict is guilty, that were are convinced beyond a reasonable doubt by the evidence that was presented at the trial," adding "I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt" because "it's the same thing." (RT 1281.) Rather than demonstrating he had committed misconduct, these statements revealed this juror understood the law, but

that he approached his duties as a juror seriously and conscientiously.

Sixth, belated inquiry of additional jurors after the court had initially inquired of the foreperson and correctly concluded there was no misconduct impermissibly resulting in an inquiry into the substance of the jury's deliberations and the thought processes of the individual jurors. Indeed, the excerpts from the court's interviews of the other jurors which are fully and completely set forth below indicate the questioning was a severe intrusion on the secrecy of the jury's deliberations to the extent it elicited their subjective thought processes during those deliberations.[12]

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[12] "Once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more important – safeguarding the secrecy of jury deliberations." (**United States** v. **Thomas, supra**, 116 F.3d at p. 618.) To this end:

"As a general rule, no one – including the judge presiding at a trial – has a 'right to know' how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror. **The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system.** While jury secrecy, like rules insulating jury verdicts of acquittal from prosecutorial challenge, necessarily served to permit nullification to occur, its primary contemporary purpose lies elsewhere. Indeed, courts and commentators alike recognize that **the secrecy of deliberations is essential to the proper functioning of juries**. It is well understood, for example, that disclosure of the substance of jury deliberations may undermine public confidence in the jury system, and pose a threat to adjudicatory function. Especially troublesome is the danger that such disclosure presents to the operation of the deliberative process itself. As one commentator has observed:

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(**United States** v. **Thomas, supra**, 116 F.3d at p. 619.)

Seventh, the jurors admitted they were not relating statements made by Juror No. 6 (other than his repeated statements that the People had not adduced sufficient evidence to prove appellant's guilt beyond a reasonable doubt), but were instead expressing their "feeling" or "belief" as to what Juror No. 6 may have been thinking or doing based ultimately upon the mere fact he refused to agree with their assessment of the evidence and join with them in finding appellant's guilty.[13] Indeed, all of the jurors

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> Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must fell completely free to dissent the credibility, motivations, and just deserts of the other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.
>
> 'Freedom of debate,' as Justice Cardoza wrote, 'might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."

(**Id.**, at pp. 618-619; citations omitted.)

[13] The prosecutor did not ask the jurors what Juror No. 6 said, but what they felt, thought or believed. (RT 1268 ["do you feel" and "do you think that based upon your feeling"], RT 1290 ["do you believe"], RT 1319 ["in your mind, do you believe"], RT 1321 ["do you feel"], RT 1329 ["do you feel"], RT 1334 ["do you

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conceded Juror No. 6 **never stated** he was unwilling to follow the law, **never stated** he was applying a standard of proof different or higher than beyond a reasonable doubt and **never stated** he was engaging or would engage in juror nullification. (See "Juror Nullification," infra.)

Eighth, it is undeniably clear the court employed a different standard when assessing the credibility of the jurors. When defense counsel noted Juror No. 2's answers were contrary to those given by the foreperson and Juror No. 1 and "this highlights the problem we're getting into" in that if Juror No. 2 was being truthful, the foreperson and Juror No. 1 necessarily were lying and, if Juror No. 6 was to be excused for "dishonesty," both the foreperson and Juror No. 1 should similarly be excused, as to the other jurors the court found "[y]ou are going to obviously get nuances what people hear and understand" and these jurors were simply "recalling events as they remember them,"[14] as to Juror No. 6 the court found he "is

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feel"], RT 1342 ["do you believe"], RT 1347 ["do you feel" and "do you think"], RT 1353 ["do you feel"], RT 1354 ["do you feel," "do you think," and "do you believe"].)

[14] Telling in this regard is the court's statement after Juror No. 3 was questioned by defense counsel:

"She's trying to testify as best she can recall to **discussions**. That would be very difficult for any of us, even with a photographic memory, to recount exactly **what certain jurors says during vigorous deliberations**. [¶] When she says, 'in essence,' she's doing her best to recall what she hears."

(RT 1317; emphasis added.)

lying." (RT 1307-1308.) When defense counsel asked how the court could impose one standard against Juror No. 6 and a completely different standard against the other jurors who "said emphatically" that Juror No. 6 "never said he wasn't going to follow the law," the court simply found "[t]hese are minor points." (RT 1308-1309.)

Although all jurors were together whenever any statement was made, when the others contradictorily testified regarding whether a particular statement was made, they were summarily deemed to be doing the best they could. When, however, wholly consistent with the testimony of some of the other jurors, Juror No. 6 testified a particular statement was or was not made, he was labeled a liar.

The court simply had no legitimate reason to conclude Juror No. 6 was being "dishonest." Moreover, to the extent it appears to be implicit in the court's "credibility" determination that it believed the motivation of other jurors in accusing Juror No. 6 of misconduct was not suspect, **Hightower** recognizes where **frustrated majority jurors** seek the holdout's removal the court "must be extremely careful not to subordinate its own adjudicatory function to the jurors' desires" as:

> "The feelings of jurors, if not disabling, furnish no more cause for removal than the court's own concern over a possible hung jury and mistrial. If the jury hangs because one juror entertains persistent doubts despite deliberating without categorical preconceptions,

> then a hung jury and mistrial must and should result. Moreover, a trial judge investigating claims of juror misconduct should be alert to **the possibility that the frustration of jurors over legitimate disagreements may color their descriptions of deliberations**, and the court should consider that factor in weighing conflicting accounts."

(**Hightower, supra**, 77 Cal.App.4th at pp. 1149-1150; emphasis added.)

Clear here is that, when questioned, every juror admitted Juror No. 6 **never** made any affirmative statement about any of the matters upon which the court ultimately based his discharge and instead each either stated or intimated his frustration with Juror No. 6 for not voting to convict appellant as they had decided to do. This makes their protestations of "misconduct" inherently suspect. The court necessarily abused its discretion in not evaluating Juror No. 6 in the same manner as it did the others.

Ninth, while manifesting a "fixed opinion" about the case will justify a juror's removal "on the ground that he could not perform his duty to render a fair and impartial verdict" (**People** v. **Daniels, supra**, 52 Cal.3d at p. 863), there was no absolutely evidence that Juror No. 6's doubts rested upon "fixed categorical preconceptions which prevent him from weighing and deliberating over the evidence or following the court's instructions" or he otherwise harbored some "immutable, categorical hostility to the basic premise

of the case," either of which would have justified discharge.[15] (**Hightower, supra**, 77 Cal.App.4th at pp. 1147, 1150.)

To this end, Juror No. 6 could be discharged only if there was substantial evidence of his "unconditional" or "absolute" inability or unwillingness to perform his duties as a juror.[16] Here, however, Juror No. 6 rightfully and responsibly believed "this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt" and "it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict,

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[15] The "categorical fixed preconception" in **Hightower** was the holdout juror's "fundamental belief in the love between a mother and son which goes to motive which is fundamental" which caused the foreperson to question whether this juror "is capable of rendering a decision and looking at the evidence where a son has killed a mother and thinking that it's possible and that he "specifically said . . . he cannot imagine what circumstances – he cannot imagine a son doing that." (**Hightower, supra**, 77 Cal.App.4th at p. 1132.) Questioning by the prosecutor elicited from the juror that "[i]t's very hard for me to believe a loving son can kill his mother with so many stab[s] like that." (**Id.**, at p. 1133.) The juror also "responded ambiguously to questions concerning the standard of proof to which he would hold the prosecution" and answered "[y]es" when asked if he would have "any trouble bringing in a verdict of guilty" if the prosecutor proved the case beyond a reasonable doubt. (**Id.**, at p. 1134.)

[16] "Categorical" is defined as "absolute, unconditional." (Oxford American Dictionary, Oxford University Press (1980) pp. 97-98.)

that we are convinced – if the verdict is guilty, that were are convinced beyond a reasonable doubt by the evidence that was presented at the trial." (RT 1280-1281.) Rather than showing a fixed or immutable "categorical" hostility or preconception, this statement reflected only his keen understanding of both the importance of the task and the standard of proof to be applied.[17]

Tenth, there was no factual basis, let alone "substantial" evidence, supporting the court's finding that Juror No. 6 was "a biased juror" against the prosecution because he "added his own words to the court's instructions as to what the law is" and was "using an illegal standard to convict" as "[h]is standard is very convinced beyond a reasonable doubt," "repeat[ed] the severity of the charge in conjunction with his bringing up the subject of juror nullification," "disagrees with the felony murder rule" and was "dishonest" to the court "in stating that no juror including himself had discussed the severity of the charge, had not discussed juror nullification." To the contrary, the evidence was that Juror No. 6 was using the correct legal standard and, in so doing, simply

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[17] This is not a case, then, where the juror indicated he "had made up [his] mind to vote for the defense before the [People] had finished presenting evidence during the trial" (**Province** v. **Center for Women's Health & Family Birth** (1993) 20 Cal.App.4th 1673, 1678-1680) or made any comment indicating his prejudgment of the case or possible concealment of bias (**Andrews** v. **County of Orange** (1982) 130 Cal.App.3d 944, 957-960).

had a view of the sufficiency of the evidence which was not shared by the others. The evidence was similarly that Juror No. 6 did not "bring up" the subject of nullification or discuss the severity of the charge in that context, but instead made one isolated reference to the reality of nullification in response to another juror.

More importantly, there was no evidence of dishonesty in his replies to the court's questions because Juror No. 6 was **never asked** whether "nullification" was "discussed," but rather whether he was of the opinion that jurors have the right to nullify (to which he answered he did not). (RT 1279.) The same is true regarding "severity," where the court asked whether he had "made reference during deliberations to the severity of the charge" and he responded "severity" was the reason why "we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." (RT 1280.)

Finally, what happened here was clearly that the jurors who were voting to convict appellant tried to browbeat into submission the lone dissenter who entertained a reasonable doubt and, when they were unsuccessful, cried "misconduct" not based upon anything Juror No. 6 actually said, but rather upon their subjective "feeling," "belief" or "impression" gleaned from his refusal to reach the same verdict they had reached. To the extent Juror No. 6 was ultimately discharged because the other jurors expressed frustration in being unable to persuade him to vote guilty, the court acceded to their wishes and

impermissibly allowed them to exercise control over the composition of the jury. (**People** v. **Roberts, supra**, 2 Cal.4th at p. 325.)

The Initial Inquiry

On the second afternoon of deliberations, the court received two note from the jury. One stated there was one juror who "has expressed an intention to disregard the law (instruction 6.10.5)" and "has expressed concern relative to the severity of the charge." The other asked "is it legally permissible for a juror to interpret page 32 of the jury instructions [CALJIC No. 6.10.5] to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future?" (CT 207-208; RT 1246-1247.)

Regarding the question, the court concluded "I believe the appropriate answer is succinct and simple, 'No.'" because "an agreement as to the specific physical target of the robbery" was "just not a requirement of the law." (RT 1247, 1253.) Regarding the statement, however, the court stated it was "inclined to ask the foreperson to come out, and we'll develop a little deeper, depending on what the foreperson says, we may ask other jurors to come out as a group or one by one or the target juror, ..."[18] (RT 1247.)

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[18] Defense counsel noted the question and statement were interrelated and objected to any inquiry because there was no showing of jury misconduct in that "[i]t appears that one juror is

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Inquiry of the foreperson revealed No. 6 never expressed any concern about punishment and it was "probably ten or fifteen times" that he "expressed that he doesn't believe that there's sufficient evidence." (RT 1251.) Inquiry accordingly ended and deliberations resumed.

The next day, the People filed a "Motion To Question Juror For Bias." (CT 203.) Citing nothing more than the jury's notes, the prosecutor asserted:

> " . . . the foreperson of the jury informed the court that one of the juror's [sic] had indicated his unwillingness to follow the law. The foreperson's note also indicated that the same juror had indicated that he thought the first-degree murder charge to be too severe. It would appear that one juror has impermissibly decided to: (1) disregard the law as instructed due to his disagreement with the law, and (2) has allowed penalty or punishment to enter into his deliberations."

(CT 205.) The court concluded "further inquiry is warranted on whether the jurors concern of the severity of the offense is just another way of saying

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interpreting CALJIC 6.10.5 . . . correctly, and the others are disagreeing with that juror, and not only disagreeing, but because of their disagreement as to the interpretation alleging that that one juror is not following the law." (RT 1248.)

they are considering punishment"[19] (RT 1262) and further questioned the foreperson.

On this occasion, the foreperson expressed his "belief" that punishment "is part of the issue in this other juror's mind that ties to the severity of the charge," explaining "[h]e's expressed to us, **in effect**, that first degree murder is a severe charge and that that has an influence on the way he interprets the evidence and the standard he uses for doubt." (RT 1266; emphasis added.) In response to the court's question "[i]s he using in his mind, then, a higher standard of proof than beyond a reasonable doubt," the foreperson also stated it was "**my opinion**, not the consensus opinion," that this juror was "using an extraordinary standard, which is beyond reason." (RT 1267-1268; emphasis added.)

Regardless, the foreperson confirmed that Juror No. 6 **was not unwilling to follow the law** since the court's answer to the question "eliminated that aspect." (RT 1268.) More particularly, he clearly and

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[19] It was at this point that defense counsel cited **United States** v. **Symington, supra**, 195 F.3d 1080 for the proposition "if there is any reason to believe that the differences among the jurors are based on the merits, **that essentially that ends the inquiry**," noted the foreman "was very clear yesterday in his answers that punishment had not entered into the jury deliberations in issue, but rather it was one juror's belief stated ten to fifteen times that he did not believe the evidence was sufficient" and argued the "court cannot investigate it without **delving improperly into juror deliberations**." (RT 1263-1265; emphasis added.)

unequivocally stated "there has been **no explicit statement on his part** that would support that" and it was only his "feeling" or "leading hypothesis" when the prosecutor asked "do you think that based upon your feeling that he's considering the severity of the charge, that because of the severity of the charge, he's unwilling to follow the instruction regarding the standard of proof." (RT 1268-1269; emphasis added.)

The foreperson also noted Juror No. 6 had repeatedly attempted to explain to the other jurors the basis for his reasonable doubt and other jurors had tried to persuade him that "his current view is incorrect." (RT 1271-1272.) More importantly, in response to the prosecutor's question whether Juror No. 6 was attempting to justify his reasonable doubt based upon a higher standard of proof, the foreperson simply answered "[n]o." (RT 1273.)

Notwithstanding that inquiry of the foreperson had clearly revealed Juror No. 6 had made no "explicit" statement constituting misconduct and that the foreperson's concern was based solely and exclusively on his "feeling," the court nonetheless decided to "ask this target juror to come in, and we'll make inquiry directly." (RT 1274.) Defense counsel again objected to "any further inquiry," noting:

> "What I heard the foreman say was that this juror believes that there is reasonable doubt, and he had clearly continued to deliberate and tried to explain his reasons, and also, he had listened to attempts to persuade him

> that he is wrong about that to other jurors and he's continually engaged in conversation with it. [¶] . . . he was asked essentially whether his opinion is based on any intent to nullify the jury, and he said no. There was never an expressed intent not to follow the law. [¶] . . . and people need to be careful to not vote guilty unless they have been convinced beyond a reasonable doubt, and we've been given absolutely no indication that anything other than that has occurred."

(RT 1275.)

The court's inquiry of Juror No. 6 revealed he "never even heard the word 'punishment' used" in deliberations, he believed "whether it's first degree murder or not [all criminal trial] should have the same burden of proof," he agreed with the reasonable doubt instruction "as I understood it," which was "there's always some possible doubt in any human affair, but if you have a reasonable doubt based on the evidence and only on the evidence that was presented at the trial, if you have a reasonable doubt about a defendant's guilt, under the law, you are required to vote not guilty" and he believed jurors "should not use juror nullification" and "[t]hey should base their decisions on the evidence that was presented at a particular trial and only on that evidence." (RT 1277-1279.) In response to the prosecutor's questions, Juror No. 6 further said there was "no indication that any juror is perhaps considering penalty even though the punishment hasn't been used or the severity of the charge," he did not recall

whether anyone had "discussed the severity of the charge" and no one had "indicated an unwillingness to follow the law." (RT 1280.)

Immediately thereafter when the court asked "have you made reference during deliberations to the severity of the charge," Juror No. 6 said "I can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt" and "[o]ther than that, I did not make a reference to the severity of the case – the severity of the charge." (RT 1280.) When the court asked him to explain what he meant by "very convinced," Juror No. 6 answered "it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced – if the verdict is guilty, that were are convinced beyond a reasonable doubt by the evidence that was presented at the trial," adding "I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt" because "it's the same thing."[20] (RT 1281.)

Notwithstanding that defense counsel was absolutely correct in noting Juror No. 6 "made it very

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[20] Although correctly arguing it was not a misstatement of the law when Juror No. 6 "inserted the word 'very' in his summary" of the beyond a reasonable doubt standard, defense counsel noted the proper remedy if Juror No. 6 indeed misunderstood the standard of proof was for the court to "reinstruct" and tell Juror No. 6 "what the standard is." (RT 1299-1300.)

clear that his understanding and his application of that understanding [regarding the burden of proof] is that it's the same standard that's applied in every case" and "he told the court no uncertain terms he's not using a different standard or higher standard or illegal standard," Juror No. 6 had effectively denounced juror nullification, Juror No. 6 was entitled to believe "it's a serious case" because "it is totally proper for someone to say, look, this is really serious" and "what we have here is Juror No. 6 expressing his opinion that the case has not been proved beyond a reasonable doubt," the court found Juror No. 6 had "engaged in misconduct." (RT 1286-1289.) Specifically, the court found Juror No. 6 was "applying a higher burden of proof than the law requires" and "isn't lying, but intentionally withheld honest information." (RT 1289.)

The Questioning Of The Other Jurors

In response to the prosecutor's question whether anyone had "indicated an unwillingness to follow the law," Juror No. 1 answered "I think there is a juror who doesn't understand the law." (RT 1290.) Regarding the severity of the charge, Juror No. 1 not only confirmed Juror No. 6 said "this is really **a very important decision that** we are making" because of the severity of the charge,[21] but that Juror No. 6

[21] While the word "consequences" was used, Juror No. 1 later made clear Juror No. 6 mentioned the seriousness of "the charge," not the "consequences" (RT 1295), which further

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never stated he was unwilling to follow the law or was unwilling to apply the standard of proof "because of the severity of the charges," Juror No. 6 **never stated** "because of the severity of this case or the severity of the charge, he is applying a standard other than or higher than proof beyond a reasonable doubt" and Juror No. 6 **never expressed an intent** "to not follow the law or rule on the facts but rather to vote based on something else, something outside this case." (RT 1292-1294; emphasis added.)

Juror No. 2 told the prosecutor Juror No. 6 "express[ed] an unwillingness or lack or desire to follow the law." (RT 1302.) When asked to explain by defense counsel, however, Juror No. 2 "paraphrased" Juror No. 6's statement as "he couldn't accept the fact that one part of the law pertained to the other part, that the shooting did not involve whatever Miss Williams was doing, and therefore, he didn't think that the penalty should be the same for her as for anybody else." (RT 1303.) When asked whether Juror No. 6 in fact used the word "penalty," Juror No. 2 conceded "I don't think he used the word penalty" and "**I think he just thought** that it shouldn't be the same." (RT 1303; emphasis added.)

Defense counsel next asked Juror No. 2 whether Juror No. 6 said "I understand this is what the law is, I'm not going to follow it" or "my interpretation of the

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confirms Juror No. 6 was not concerned with penalty or punishment, but the importance of the decision being made.

law is that it doesn't apply here." (RT 1303.) Although Juror No. 2 answered "[i]t was both, really," this juror admitted Juror No. 6 never said "I'm not going to follow the law." (RT 1303-1304.)

Juror No. 2 also admitted Juror No. 6 never said "he was going to use a standard of proof other than proof beyond a reasonable doubt as defined by the court." (RT 1305.) Rather, this juror was simply of the belief Juror No. 6 "just didn't like the whole idea." (RT 1305.) When asked to explain what was meant by this statement, however, Juror No. 2 unequivocally stated Juror No. 6 "didn't believe that whatever was in evidence was enough evidence for him." (RT 1306.)

Juror No. 3 confirmed Juror No. 6 "did say" that "he didn't believe that the evidence that was shown in trial was sufficient to prove the charge of murder." (RT 1311.) Regarding Juror No. 6 mentioning the "severity of the charge," when asked what Juror No. 6 said Juror No. 3 admitted "**I can't recall the exact words**, but I know he was – he said it was too severe a charge for what he thought was done." (RT 1310-1311; emphasis added.) Regarding Juror No. 6 indicating "an unwillingness to follow the law," Juror No. 3 said "[h]e was putting an interpretation of his own into the law other than following the law as it was written." (RT 1311.)

Juror No. 3 added Juror No. 6 "said a number of times" that "he interpreted the law a different way than everybody else did" and that he was "very adamant in his opinion" and "more than one time he said,

that's it, I'm not going to change my mind." (RT 1313-1314.) Juror No. 3 also conceded it was "[i]n essence" and "[m]aybe not in those exact words" because "I can't remember exact words" when defense counsel asked whether Juror No. 6 said "I don't agree with that interpretation of the law" or "I'm not following the law." (RT 1314-1315.)

Regarding the standard of proof, Juror No. 3 again could not "quote his exact words" or "remember the exact words" but asserted Juror No. 6 had used "phrases" that "were different than beyond a reasonable doubt." (RT 1315-1316.) When asked about "the gist of the words," Juror No. 3 said "[n]o doubt, possibly" and "I can't say absolutely." (RT 1316.)

In response to the prosecutor's question "during deliberations, has one or more of the jurors expressed and unwillingness or lack of desire to follow the law," Juror No. 4 answered "I guess he's reading the law differently than the rest of the jurors are." (RT 1319.) Juror No. 4 was "not sure" when asked "in your mind, do you believe he's considering penalty or severity of the charge." (RT 1319.) Juror No. 4 conceded, however, that Juror No. 6 "believes from the evidence that he's seen that there hasn't been sufficient proof" and unequivocally answered "no" when asked "other than saying that he interpreted the instructions differently than other jurors, did one juror every say I don't care what the instructions say, I'm not going to follow them." (RT 1320.)

Although every other juror said "penalty" was never mentioned, Juror No. 5 claimed Juror No. 6 "in those type of words" had said "no way I could come to a decision with that kind of penalty for that kind of charge." (RT 1322.) Juror No. 5 also asserted he felt Juror No. 6 had expressed an unwillingness to follow the law, bought the issue of penalty or consequences into the deliberations and "is perhaps applying a standard that is different that beyond a reasonable doubt." (RT 1321.)

Regarding whether Juror No. 6 had in fact stated "that he was unwilling to follow the law," however, Juror No. 5 admitted it was "in some context." (RT 1322.) Regarding whether Juror No. 6 had in fact stated "I know that's what the law means, but I'm not going to follow it, Juror No. 5 admitted it was "not exactly those words." (RT 1322.) Regarding whether Juror No. 6 had in fact stated he was applying or going to apply a standard other than proof beyond a reasonable doubt," Juror No. 5 admitted "I don't believe it was stated that way, no." (RT 1324.) Specifically, he said he felt the standard Juror No. 6 was applying was "positive, without any doubt" even though Juror No. 6 had not said that "in those uncertain terms" and conceded "you'd have to say it's **more of a feeling** that you have from the way the things that were said and the application of the proof there was and the way it was presented." (RT 1325; emphasis added.) Indeed, Juror No. 5 answered "absolutely" when asked "[h]e **never said** he wasn't going to follow the proof beyond a reasonable doubt standard;

however, given what his conclusions were regarding the evidence that you all saw, **you felt that** he really wasn't applying that standard." (RT 1325; emphasis added.)

Regarding whether nullification was ever discussed, after Juror No. 5 said "I don't think so" and "I don't remember that actually coming up," he said "in the heat of the argument, because it does get heated back and forth from a bunch of different people," one of the other jurors asked Juror No. 6 whether he had "a political agenda" and Juror No. 6 said "no." (RT 1326.) He also answered "[a]bsolutely, and I think the statement was made, also, that 'I'm not going to speak to that because that does not apply to this case" when defense counsel asked whether in response to the other juror's "political agenda" question Juror No. 6 mentioned "some things about past trials in American history." (RT 1327.)

Juror No. 7[22] stated Juror No. 6 "did not say he was going to refuse to follow the law" and never said "I know the law is this way, but I'm not following the law" or "I know this is what it means and says, but I'm not following it." (RT 1329.) When asked "[h]ow is it that he indicated an unwillingness to follow the law, then," Juror No. 7 simply said "I think by his – some of his improper statements" gave "**the impression** that he wasn't willing to follow the law." (RT 1330; emphasis added.)

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[22] This juror is misidentified as Juror No. 6.

Juror No. 7 admitted there was no mention of "penalty" and the "severity" discussion was about "the charge of first degree murder." (RT 1331.) Juror No. 7 also confirmed Juror No. 6 said the concept of juror nullification "had nothing to do with" how he was voting. (RT 1332.)

Regarding unwillingness to follow the law, Juror No. 9 said "I don't know if it was a lack of desire to follow the law, but he didn't – one gentleman didn't seem to agree that that was, you know, what the law really says." (RT 1334.) Juror No. 9 answered "[n]ot in those exact words, not to my knowledge" when asked "[d]id he ever says expressingly, 'I know this is what the law is, but I'm not following it" and "[o]h, yes, he definitely felt that way" when asked "[w]as it more in line of . . . under my interpretation of the law, I don't believe the evidence was sufficient to show something."[23] (RT 1336.)

Regarding "severity," Juror No. 9 noted Juror No. 6 said "this is a serious thing, and I don't really feel that there is enough cause for – or something to that effect." (RT 1339.) Juror No. 6 also said "I wouldn't want to take anyone's freedom away, unless I was sure than certain things took place." (RT 1339.) Possible punishment was ever discussed and Juror No. 6 never said "if the penalty was going to be a lot less, I wouldn't have a problem voting a certain way

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[23] Juror No. 9 said there was "no mention of" nullification. (RT 1335.)

in this case." (RT 1338-1339.) Ultimately, the "gist" of the "severity" discussion was "first degree murder was a very serious crime" and Juror No. 6 "didn't feel there was enough proof of it." (RT 1339.)

Regarding the standard of proof, Juror No. 9 answered "[n]ot in as many words, but he **implied it**" when asked whether Juror No. 6 ever said "I understand that the standard of proof is beyond a reasonable doubt, but I'm not following that standard." (RT 1339-1340; emphasis added.) Juror No. 9 added Juror No. 6 never said "he purposely wouldn't do it – wouldn't follow the instructions" and, after the court answered his question about CALJIC No. 6.10.5, never said he was not "going to abide by it." (RT 1340-1341.)

As to the standard of proof, Juror No. 10 said "basically" Juror No. 6 had both said he "interpreted" the instruction "to mean something else" and knew what the words meant "but I'm not following it." (RT 1342-1343.) Juror No. 10 explained Juror No. 6 would "read more into it" and "add words to the law to how he thought it should be." (RT 1343.) Juror No. 10 felt Juror No. 6's arguments "were based on that he didn't agree with the law, that the law he thought should say this." (RT 1344.) Juror No. 10 did concede, however, that Juror No. 6 "didn't think the evidence showed" guilt beyond a reasonable doubt and "didn't believe the evidence showed first degree murder should be the charge." (RT 1344, 1346.)

Juror No. 11 admitted Juror No. 6 never said he was voting a certain way "despite what he found the evidence to be." (RT 1348.) Juror No. 11 admitted the "feeling" that Juror No. 6 was unwilling to follow the law was based on his "interpretation of the law" and he never "specifically" said "even if the judge said that, I still disagree with it, I will not follow that law" and "never said he's not going to follow the law." (RT 1349-1350.)

Regarding the standard of proof, Juror No. 11 admitted "there is no way I can know in his mind what he's thinking." (RT 1351.) Juror No. 11 nonetheless explained "based on what we were presenting to him and trying to get him to just buy off on one piece of one part of something, he wouldn't even – what's the word – it's like he wouldn't even entertain the thought." (RT 1351.) Juror No. 11 admitted Juror No. 6 "said it wasn't proof beyond a reasonable doubt," not that he was not following the legal standard, and it was "because of your view of the evidence" that Juror No. 11 "in your own mind" had "the feeling" that Juror No. 6 was applying a different standard. (RT 1351.)

Juror No. 12 did not "directly" feel Juror No. 6 disagreed with the law, but "it's the interpretation based on their own belief" and "[i]t's an interpretation issue." (RT 1354-1355.) Juror No. 12 felt Juror No. 6 required "absolute proof" or "more proof than what they believed was given within the trial" and believed he was using a "no doubt" standard. (RT 1354.) Juror No. 12 admitted Juror No. 6 never said

he was not going to follow the law, but rather that the evidence "doesn't persuade me beyond a reasonable doubt." (RT 1355-1356.)

Additional Reasons Why The Court's Findings Were Erroneous

First, while the court may have been correct in stating "if a juror is basing decision on the seriousness of the offense saying first degree murder is a serious crime and based burden of proof on the seriousness of the crime, then an argument can be made that they're relying on an illegal burden of proof," it was patently incorrect in concluding "[i]f you focus on the seriousness of the offense, **an inference can be drawn** that the juror is requiring more than proof beyond a reasonable doubt" because that inference was not logical on the facts then before the court and wholly speculative.[24] (RT 1276; emphasis added.) Rather, as defense counsel noted, the reasonable inference regarding this or any other juror's concern about the "seriousness" or "severity" of the offense was instead that the juror was "going to be extremely sure that there is proof beyond a reasonable doubt" **precisely because** the offense was serious or severe.

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[24] A speculative inference is not "substantial" evidence. (**People v. Morris** (1988) 46 Cal.3d 1, 21; **California Shoppers, Inc. v. Royal Globe Insurance Co.** (1985) 175 Cal.App.3d 1, 45.)

The inference underlying the "fact" found to justify discharge of Juror No. 6 was unfounded. There accordingly is no "substantial evidence" justifying the court's exercise of discretion. Reversal is required for this reason alone.

Second, when the prosecutor asked the court to remove Juror No. 6, the stated grounds were "[h]e's not being forthcoming to the court" about whether the jury had discussions about "severity" and "nullification." Specifically, the prosecutor asserted "this gentleman states that there was no discussion about the severity of the charge" and when the court asked "whether anyone was discussing the idea of jury nullification" he had said no, but when she asked the same question "at that point, he admitted that he had discussed the fugitive slave laws and people burning draft cards, which is unequivocally not a proper matter to be discussed back during jury deliberations." (RT 1283.)

These assertions were patently baseless. The record reveals the court **never asked** Juror No. 6 whether the issue of nullification was "discussed" by the jurors, but instead asked "[i]n your opinion, do jurors have the right what we call juror nullification, that is, vote against the law based on some other reason," to which Juror No. 6 clearly replied jurors "should not use juror nullification." (RT 1279.) Similarly, the court **never asked** Juror No. 6 whether the issue of severity was "discussed" by the jurors, but instead asked whether he had "made reference during deliberations to the severity of the charge," to

which Juror No. 6 was unquestionably "forthcoming" in responding that "severity" was the reason why "we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." (RT 1280.)

Third, the prosecutor additionally asked the court to remove Juror No. 6 on the ground "the foreperson told us that there was an explicit unwillingness by this individual to follow the law in 6.10.5" and "[h]e was instructed he must follow the law, and he explicitly stated he wouldn't follow the law." (RT 1284.) The record again belies this assertion as the foreperson unequivocally stated that "there has been **no explicit statement on his part** that would support that" conclusion and this was nothing more than his "feeling" or "leading hypothesis" and the court's answer to the question "eliminated that aspect" (RT 1268-1269; emphasis added) and nowhere is there any statement whatsoever made by or attributed to Juror No. 6 which was an explicit or affirmative statement of unwillingness to follow the law, let alone any other statement from which any such unwillingness could reasonably be inferred.

Fourth, there was no evidence whatsoever that Juror No. 6 was using "a higher standard coupled with the severity of the charge." (RT 1285.) Rather, Juror No. 6 simply made a statement regarding the **importance of having proof beyond a reasonable doubt** before convicting because the task of determining guilt or innocence was "serious" or "severe." Indeed, **absolutely every response** by Juror

No. 6 to the questions posed revealed nothing more than he took his responsibility as a juror very seriously.

Fifth, there was no substantial evidence supporting the court's finding Juror No. 6 was "a biased juror" against the prosecution. Regarding "bias" generally,[25] it is clear bias in a juror "may not be presumed" (**People** v. **Williams** (1997) 16 Cal.4th 153, 232) and the court may not "presume the worst"

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[25] "What constitutes 'actual bias' of a juror **varies according to the circumstances** of the case." (**People** v. **Nesler** (1997) 16 Cal.4th 561, 580, quoting **In re Carpenter** (1995) 9 Cal.4th 634, 653-654; emphasis added.) **Nesler** explains:

"In assessing whether a juror is 'impartial' for federal constitutional purposes, the United States Supreme Court has stated: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.' '"The theory of the law is that a juror who has formed an opinion cannot be impartial." [¶] It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . **It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.**' '"**[L]ight impressions, which may fairly be presumed to yield to the testimony** that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but . . . those **strong and deep impressions which close the mind against the testimony that may be offered in opposition to them**, which will combat that testimony and resist its force, do constitute a sufficient objection to him."'"

(**Nesler**, 16 Cal.4th at pp. 580-581; emphasis added and citations omitted.)

(**People** v. **Goldberg** (1984) 161 Cal.App.3d 170, 192). Rather, like anything else purportedly establishing a juror's inability to perform his duty, "actual bias" must necessarily appear in the record as a "demonstrable reality" upon proof by "substantial evidence." As such, the stated reasons underlying the court's finding Juror No. 6 was "a biased juror" must be supported by substantial evidence.

To this end, specifically regarding the standard of proof, all the other jurors **conceded** Juror No. 6 never made any statement indicating he was employing any standard other than the applicable standard of proof beyond a reasonable doubt. Rather, it was only that they did not understand why Juror No. 6 did not reach the same conclusion they had that they felt, believed or assumed he must have been using some other standard of proof.[26] This is not substantial evidence of his inability to perform his functions as a demonstrable reality.

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[26] Although Juror No. 6 told the court "I can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt" and explain what he meant by "very convinced" was "it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced – if the verdict is guilty, that were are convinced beyond a reasonable doubt by the evidence that was presented at the trial" (RT 1280-1281), no juror stated that during deliberations Juror No. 6 ever said he must be "very convinced" before he could or would find appellant guilty.

Specifically regarding "severity" and "nullification," all the other jurors similarly conceded Juror No. 6 never made an explicit statement regarding either topic. Their attributing "misconduct" to Juror No. 6 was admittedly the byproduct of how these frustrated jurors felt about his refusal to convict appellant and nothing more. This too is not substantial evidence of his inability to perform his functions as a demonstrable reality.

Specifically regarding the purported dishonesty of Juror No. 6, after questioning the foreperson, Juror No. 6 and Juror No. 1, the court specifically found Juror No. 6 "was dishonest here in stating that no juror, including himself, had discussed subject of juror nullification" and "he was dishonest when he stated that no juror, including himself, had discussed the topic of the seriousness of the charge or the case." (RT 1297.) Clearly, however, there was no evidence, "substantial" or otherwise, that Juror No. 6 "was dishonest" precisely because **no such questions were asked** by the court.[27]

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[27] The court's first question to Juror No. 6 was "has any juror, including yourself, indicated that they are motivate at all by the issue of possible punishment in this case." (RT 1277.) He **was not asked** whether the issue was "discussed" by the jurors. The court later asked Juror No. 6 "in your opinion, do jurors have the right what we call juror nullification, that is, vote against the law based on some other reason." (RT 1279.) Again, he **was not asked** whether the issue was "discussed" by the jurors.

Moreover, to the extent the court Juror No. 6 "have you made reference during deliberations to the severity of the charge," he answered "I can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt" and "[o]ther than that, I did not make a reference to the severity of the case – the severity of the charge." (RT 1280.) Juror No. 6 did not denying making the statement and was truthful in his reply. This was not "dishonest."

"Juror Nullification"

Whether a court violates a defendant's Sixth Amendment rights by dismissing a deliberating juror whom it believes is "engaged" in jury nullification is an issue presently before the California Supreme Court in **People** v. **Williams** (S066106).[28] To the extent the court noted Juror No. 1 "himself set forth the basis to exclude" Juror No. 6 in stating Juror No. 6 had "raised the topic" of juror nullification (RT 1298), the question here is whether the mere fact that a juror made some statement that "raised the topic,"

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[28] Review has also been granted in **People** v. **Odam** (077469) [69 Cal.App.4th 1192] where, in stark contrast to the facts adduced in appellant's case, the juror "made clear he would not follow the court's instructions where he did not agree with them, but instead, would 'vote [his] conscience,' regardless of what the judge said' and further indicated that his conscience did not relate to the laws."

without any affirmative statement indicating the juror intends to engage in nullification, demonstrates his inability to perform his duties and constitutes sufficient cause for discharge.

The California Supreme Court long ago held "while . . . a defendant is not entitled to be tried by a jury composed of any particular individuals, but only by a jury composed of qualified and impartial jurors, **this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during the trial, has given the impression that he favors one side or the other.**" (**People** v. **Hamilton, supra**, 60 Cal.2d at p. 128; emphasis added.) Here, there was mere "reference" to nullification, Juror No. 6's stated belief nullification was in fact improper and no affirmative evidence whatsoever from any of the other jurors that Juror No. 6 **intended** to nullify the verdict.[29]

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[29] **Thomas** concluded "a deliberating juror's **intent to nullify** constitutes 'just cause' for dismissal" within the meaning of rule 23(b) of the Federal Rules of Criminal Procedure, which provides a deliberating juror may be discharged when "necessary" for "just cause." (**Thomas, supra**, 116 F.3d at p. 612; emphasis added.) No federal (or California) case holds such "just cause" is shown by mere reference to the fact of nullification. To the contrary, the federal cases recognize "juries have the power to ignore the law in their verdicts," although courts "have no obligation to tell them they may do so." (See **Thomas** v. **Clark** (2000 WL 335611, *3 (N.D. Cal.)) and cases cited therein.)

There is nothing "serious," "wilful," "wanton" or "reckless" in a besieged holdout juror making an isolated comment in response to another juror's question on the second day of deliberations after repeatedly explaining why he believed the evidence was insufficient to convict.[30] Juror No. 6's inability to perform his duties simply does not "appear in the record as a demonstrable reality" precisely because his statement revealing he was aware nullification exists, without more, necessarily fails to establish he would nullify or was nullifying the verdict, particularly given the "ten or fifteen times" during deliberations that he "expressed that he doesn't believe that there's sufficient evidence." The court clearly abused its discretion in discharging Juror No. 6 to the extent it was based upon the mere fact he "raised the topic" of juror nullification.

Conclusion

"Service on a murder trial jury is not entertainment; such duty is serious and onerous." (**People** v. **Osband** (1996) 13 Cal.4th 622, 675.) Agree with his

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[30] Rather than establishing what the court inferred was a bias against the prosecution, Juror No. 6's reference to nullification was obviously nothing more than a "momentary exasperation with the proceedings." (**People** v. **Kaurish** (1990) 52 Cal.3d 648, 694.) As the California Supreme Court astutely recognizes, "common sense suggests that he would have simply remained silent" if Juror No. 6 had indeed formed improper opinions about the case and intended to act in ways prejudicial to the prosecution. (**People** v. **Ray** (1996) 13 Cal.4th 313, 344.)

conclusion or not, it was clear Juror No. 6 was a holdout juror for acquittal, he questioned the sufficiency of the People's evidence to prove appellant's guilt beyond a reasonable doubt and there was no substantial evidence of his inability to perform his functions as a juror "as a demonstrable reality." The court clearly abused its discretion in discharging Juror No. 6 and appellant was thereby denied her Sixth Amendment right to a unanimous jury. Appellant's conviction must accordingly be reversed. (**People** v. **Hamilton, supra**, 60 Cal.2d at p. 128; see also **Perez** v. **Marshall** (9th Cir. 1997) 119 F.3d 1422, 1426-1428 and **United States** v. **Brown, supra**, 823 F.2d at p. 597.)

* * *

[Declaration Of Service Omitted In Printing]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT,
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **GARDE KEISHON TAYLOR, TARA WILLIAMS,** Defendants and Appellants.	B137365

Los Angeles County Superior Court No. NA039425
The Honorable William T. Garner, Judge

RESPONDENT'S BRIEF

(Filed Sep. 21, 2000)

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ARGUMENT

I.

THE TRIAL COURT PROPERLY DISCHARGED JUROR NO. 6 FOR BIAS

Appellant Williams first contends the court abused its discretion in discharging the "lone holdout juror" (Juror No. 6) because the facts and circumstances revealed there was no substantial evidence establishing actual bias or the target juror's inability to perform his duties. (Williams AOB 6-42.) Respondent disagrees. The trial court properly discharged Juror No. 6 for good cause.

A. Relevant Proceedings

1. September 22, 1999, Note From The Jury

During deliberations, the court received a note from the jury. The note stated: "Relative to jury instruction 17.14.1 [sic] I wish to inform you that we have one juror who: 1) has expressed an intention to

disregard the law (instruction 6.10.5 [Conspiracy and Overt Act – Defined – Not Pleaded As a Crime Charged], line 1 & 2) and 2) has expressed concern relative to the severity of the charge (1st degree murder)." (Williams CT 207; Williams RT 1250.) Outside the presence of the jury, the court questioned the foreperson. (Williams RT 1250.) After the foreperson stated there had been no expressed concern regarding the possible punishment, the following colloquy took place:

> "THE COURT: Without telling us about jury's assessment of the evidence, can you explain what is meant by 'has expressed concern relative to the severity of the charge'?
>
> "THE FOREPERSON: This particular juror, who is the same juror as in the first part of that concern, has probably ten or fifteen times in our conversations so far expressed that – please stop me if I'm going out of bounds here – expressed that he doesn't believe that there's sufficient evidence – " (Williams RT 1251.)

The court stopped the foreperson and explained that the parties were only interested in potential juror misconduct and not the jury's thought process. (Williams RT 1251-1252.) The court stated:

> "The only thing we're concerned about here is misconduct, which means the juror says something like, I can't convict anybody of first degree murder because of the punishment or something like that, or I had a

> cousin in a similar situation, and I wouldn't want the person here to suffer what, you know, my cousin went through, something like that." (Williams RT 1252.)

The foreperson responded, "I think it's halfway to that, and so I think that one's a little iffy, and I think your answer to the first part may be sufficient to resolve our concern at this time." The court then ordered the jury to continue with deliberations. (Williams RT 1252.)

2. The Prosecutor's September 23, 1999, Request For Further Inquiry

The following day, the prosecutor moved to have the court make a further inquiry as to the juror misconduct. (Williams RT 1257.) The court stated a portion of the question read, "' . . . has expressed concern relative to the severity of the charge,'" but noted the word "punishment" had been erased and substituted with the word "charge." (Williams RT 1258.) After entertaining arguments from the parties, the court found "further inquiry [was] warranted on whether the jurors concern of the severity of the offense [was] just another way of saying they [were] considering punishment." (Williams RT 1258-1262.) The court suggested the following procedure:

> "I will make inquiry first, and then both counsel may make direct inquiry. [¶] We'll start with the foreperson there, and then I will consult with counsel before deciding whether we need to make individual inquiry

> of the target juror or any others, so we'll start with the foreperson once we find the defendant." (Williams RT 1262.)

After a recess, defense counsel returned to court and argued any further inquiry would violate appellant Williams's Sixth Amendment right to a fair trial and unanimous jury because the foreperson clearly stated the possible punishment had not entered into the jury's deliberations. (Williams RT 1264.) The court responded as follows:

> "I believe the situation here is distinguished. [¶] We have, apart from that, an issue involving juror misconduct if it were to occur that position is being based on the severity of the offense and punishment, and I think this is really separate from the issue about the nature of the conspiracy that has to be proven. I think this is entirely separate. The issue about whether a juror is motivated by punishment is entirely separate from the issue about whether they have to find the conspiracy to rob a particular location or not, so I find it's distinguished, so ask the bailiff to ask the foreperson to return." (Williams RT 1265.)

3. The Thal Court's Further Inquiry

a. Juror No. 8 – Foreperson

The court asked the foreperson whether he believed the target juror was motivated by punishment. (Williams RT 1266.) The foreperson responded:

> "I wrote – I wrote 'punishment' for two reasons. [¶] One, is that in the section of the jury instructions, the word 'punishment' is used. [¶] Secondarily, I believe that punishment – I believe that punishment is part of the issue in this other juror's mind that ties to the severity of the charge. [¶] I read what I had written to the group, and there was [sic] a couple suggestions. There seemed to be a consensus that that word should be removed, so my judgment is different than the consensus of the group." (Williams RT 1266-1267.)

The foreperson continued:

> " . . . The juror has stated five, maybe ten times that the charge of first degree murder – bear with me. I'm not used to – [¶] He's expressed to us, in effect, that first degree murder is a severe charge and that that has an influence on the way he interprets the evidence and the standard he uses for doubt. I hope I haven't crossed the line." (Williams RT 1267.)

The court asked the foreperson whether, in his opinion, he believed the target juror applied a higher standard of proof than proof beyond a reasonable doubt. The foreperson replied:

> "I can't speak to his mind per se, but in my opinion, my opinion, not the consensus opinion, which I can speak to in a moment if you'd like, but in my opinion he using an extraordinary standard, which is beyond

> reason. [¶] I can restate that more clearly if you'd like; that is to say, I think that his – I – we have spent some time now trying to understand the reasonable basis for his doubt, and I personally did not understand it, and that was to be – all right. I think I've said enough." (Williams RT 1267-1268.)

After the court's inquiry, the prosecutor and defense counsel questioned the foreperson. (Williams RT 1268.) Defense counsel asked the following question:

> "[DEFENSE COUNSEL]: How about the first part? [¶] Has this juror expressed a willingness to follow the law as he interprets it?
>
> "[FOREPERSON]: He has not expressed explicitly a willingness to follow the law, but to answer completely, he also has not – to answer this question I need to say something else. [¶] Please stop me when I'm getting out of bounds again, okay? [¶] But on the first day of our deliberations, on Tuesday morning, he brought up the subject that in the past, in history, there have been occasions when juries have refused to follow the law; for example, in early pre-Civil War times, there have been juries that refused to convict people for harboring fugitive slaves, and there was a later incident he cited which – in which people had refused to find people guilty of burning draft cards, and he might have had one other example, so I believe that there is, in the back of his mind, a belief – this is my belief now, that there is a belief

> that that is a civic responsibility to – there's a name for this – civil disobedience. There's a responsibility to be disobedient in that case. [¶] However, yesterday, I asked him explicitly if that's what was going on here, and he answered no, it wasn't." (Williams RT 1269-1270.)

Defense counsel asked, "Just so the record is clear, this person has not – is that correct, this person has not expressed an unwillingness to follow the law, an explicit unwillingness to follow the law?" (Williams RT 1271.) The foreperson answered:

> "There was an explicit unwillingness to follow the law that was addressed yesterday with the question and answer that he had yesterday afternoon, I believe it was, and currently, we have a fair – not purely explicit, but fairly clear statement on juror's part that connects the severity of the charge with – explicitly of first degree murder with his need for a higher standard." (Williams RT 1271.)

However, the foreperson stated the target juror never expressly stated he refused to follow the law. (Williams RT 1271.) The foreperson also stated two-thirds of the jury tried to persuade the target juror, without the use of threats or insults, that his view was incorrect and were engaged in "intellectual conversation." (Williams RT 1272-1273.) The prosecutor asked, " . . . When you were talking about his and the – his attempts to explain, is his attempt to explain why he has a higher standard? Is that part of his attempts to

explain?" The foreperson replied, "No. . . . Well, except to say that he has coupled that with the severity of first degree murder." (Williams RT 1273-1274.)

The foreperson was excused, and the trial court stated it was inclined to call the target juror. (Williams RT 1274.) Defense counsel disagreed because it appeared the target juror simply believed there was reasonable doubt. (Williams RT 1275.) The court disagreed and found the target juror may have applied an excessive burden of proof. (Williams RT 1276.)

b. Juror No. 6 – Target Juror

The court asked the target juror whether any juror, including himself, indicated a motivation by the potential punishment. (Williams RT 1277.) The target juror replied, "No, I never even heard the word 'punishment' used," denied using a higher burden of proof than was required for criminal offenses, and recalled the instruction defining "reasonable doubt." (Williams RT 1277-1279.) The target juror also believed "jurors should not use juror nullification." (Williams RT 1279.)

The prosecutor asked, " . . . have you had any indication that any juror is perhaps considering penalty even though the punishment hasn't been used or the severity of the charge?" The target juror replied, "No, not that I recall" and stated there was no indication of an unwillingness to follow the law. (Williams RT 1280.)

Before the target juror was excused, the court asked, "Just to be clear, have you made reference during deliberations to the severity of the charge?" (Williams RT 1280.) The following colloquy took place:

> "[TARGET JUROR]: No, I – Well, let me amend that. [¶] I said I can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt. Other than that, I did not make a reference to the severity of the case – severity of the charge.
>
> "[THE COURT]: Now, let's assume a criminal case and the jurors are told to convict. The prosecutor has to prove this beyond a reasonable doubt. [¶] Let's assume the identical charge in another case where the judge instructs you can only convict if the prosecution proves her case, and you are very convinced beyond a reasonable doubt, same charge, same evidence. Are those two different standards?
>
> "[TARGET JUROR]: No, they're the same standards as far as –
>
> "[THE COURT]: What does 'very convinced' add?
>
> "[TARGET JUROR]: It just means it's a good – it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced – if the

> verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial.
>
> "[THE COURT]: So if a juror were not instructed that the only way you can convict is if you are very convinced beyond a reasonable doubt, then jurors might base the decision without that careful scrutiny you're talking about?
>
> "[TARGET JUROR]: No, I don't think that – I think – I think convinced beyond a reasonable doubt is the standard, and I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt. I think it's the same thing." (Williams RT 1281.)

The prosecutor asked one more question: " . . . Was there any discussion about what the judge described as jury nullification? Did anyone discuss that issue?" The target juror replied:

> "Yes, someone brought up the case that some – I don't remember – someone stated raised the question whether juries always convict according to the law, and I can remember I said sometimes they don't. [¶] I know of cases in the Vietnam War era where people did not convict people who were clearly in violation of law. [¶] I also know that in the 19th century the fugitive slave law was not always enforced, became impossible to enforce, because juries would not convict

> people who were clearly in violation of it." (Williams RT 1282.)

The target juror was excused from the courtroom. (Williams RT 1282.)

The prosecutor asked the target juror be removed from the jury because he was not forthcoming, applied a higher standard of proof, and concealed relevant facts during voir dire. (Williams RT 1282-1286.) Defense counsel disagreed and argued the target juror had a reasonable doubt. (Williams RT 1286-1288.)

While the trial court was inclined to find the target juror engaged in juror misconduct, it wanted to give defense counsel the opportunity to question the other jurors and to create a record. (Williams RT 1288-1289.) The court stated:

> " . . . I am inclined to rule that the juror has engaged in misconduct. He's applying a higher burden of proof than the law requires – I'll make a fuller record later – and that he isn't lying, but intentionally withheld honest information.
>
> "When asked whether any juror had discussed juror nullification and had discussed the seriousness of the offense, he initially said no to both of those quite clearly and contradicted himself and admitted that he in fact had responded to a juror's question about jurors not following the law, which, in my mind, is simply that juror focusing on this juror, who in the other jurors' minds, is

> not following the law, and they are asking whether any jurors have not followed the law, not raising improper subject, but focusing on him because he's not following the law, and but I'll allow a fuller record so [defense counsel] may inquire as to the other jurors." (Williams RT 1289.)

c. Juror No. 1

When asked whether there were any discussions regarding the severity of the charge, Juror No. 1 replied, "Yes." (Williams RT 12901291.) Juror No. 1 further explained, "It was just a comment by a juror to the other jurors that, you know, this is really a very important decision that we are making because of the severity of the consequences." Juror No. 1 later stated the target juror discussed the seriousness of the charge, not the seriousness of the consequences. However, Juror No. 1 stated that the target juror never indicated he was unwilling to apply the proper standard of proof, had a difference of opinion, initiated a discussion regarding jury nullification, and did not express an intent to nullify. (Williams RT 1291-1295.)

d. Juror No. 2

Juror No. 2 stated he or she was not aware of discussions involving the severity of the charge, but stated the target juror expressed an unwillingness to follow the law. (Williams RT 1302.) Juror No. 2 explained:

"At one point, I believe he said that he just couldn't – I'm trying to use his words and I'm going to have to paraphrase it – he couldn't accept the fact that one part of the law pertained to the other part, that the shooting did not involve whatever [appellant Williams] was doing, and therefore, he didn't think that the penalty should be the, same for her as for anybody else." (Williams RT 1302-1303.)

The following discussion took place:

"[DEFENSE COUNSEL]: In – in – did he say that, look, this is – I understand this is what the law is, I'm not going to follow it, or was he saying my interpretation of the law is that it doesn't apply here?

"[JUROR NO. 2]: At one time, he probably said your first statement. Then, at other times, he said your second statement. It was both, really.

"[DEFENSE COUNSEL]: When you say probably, is that your just the take that you have on it or did you

"[JUROR NO. 2]: No, he said that.

"[DEFENSE COUNSEL]: He said, 'I'm not going to follow the law'?

"[JUROR NO. 2]: Oh, he went into some farfetched explanation of how people during the Vietnam War burned their draft cards because they didn't approve of whatever

> the law was and this was his proper test." (Williams RT 1303-1304.)

Juror No. 2 stated the target juror was the only juror who brought up jury nullification. (Williams RT 1304-1305.) Juror No. 2 also explained that, while the target juror never stated he was going to apply a higher standard of proof, he "just didn't like the whole idea" and "didn't believe that whatever was in evidence was enough evidence for him." (Williams RT 1305-1306.)

After Juror No. 2 was excused, defense counsel argued that the foreperson and Juror No. 1 were liars and moved to exclude them from the jury. (Williams RT 1307.) The court responded:

> "No, it shows the exact opposite. It shows that he does more and more wrong the more and more people we talk about. [¶] This juror now is clearly indicating that he stated he would not follow the law, he disagreed with the law, the culpability of the actions of the defendant here. [¶] We have twelve people testifying to deliberations. You are going to obviously get nuances what people hear and understand. [¶] These jurors clearly, without any question, based on demeanor and the entire record, are not being dishonest. They are recalling events as they remember them. [¶] Juror Number Six is lying. That's the difference. . . ." (Williams RT 1308.)

e. Juror No. 3

Juror No. 3 stated the target juror indicated an unwillingness to follow the law, discussed the severity of the charge, believed "it was too severe a charge for what he thought was done," and did not believe the evidence was sufficient to prove murder. (Williams RT 1309-1311.) Juror No. 3 also stated the target juror understood the law, could not follow the law as it was written, and possibly used a "no doubt" standard of proof. (Williams RT 1311-1316.)

f. Juror No. 4

Juror No. 4 stated that one juror read the law "differently than the rest of the jurors are." However, Juror No. 4 was not sure whether the target juror considered penalty or severity of the charge or applied a standard other than proof beyond a reason-able doubt. (Williams RT 1319-1320.) Juror No. 4 further stated the target juror did not indicate he would disregard the law. (Williams RT 1320.)

g. Juror No. 5

Juror No. 5 stated the target juror expressed an unwillingness or lack of desire to follow the law, applied a standard different from beyond a reasonable doubt, and that the issue of penalty or the consequences of the charge was raised during deliberations. (Williams RT 1321.) Juror No. 5 stated,

"If you want my exact opinion on this, I think it's because he doesn't feel that the penalty that is being – or not penalty, but the charge warrants the crime." Juror No. 5 continued:

> "He – I have the – I have the opinion from the things that were said that he doesn't feel that you could come to a conclusion with the evidence that was there – you can't charge somebody for something they didn't do if they weren't there at the time because they – well, honestly, he doesn't think the burglary or robbery and a death penalty – or a first degree murder charge can be tied together in one sentence." (Williams RT 1324.)

Moreover, Juror No. 5 believed the target juror applied a "positive, without any doubt standard of proof." (Williams RT 1324-1325.) This belief was based on the target juror's comments. (Williams RT 1325.) Juror No. 5 could not recall whether the subject of jury nullification was discussed. However, Juror No. 5 recalled the target juror discussed past trials in American history after another juror had raised the issue. (Williams RT 1325-1327.)

h. Juror No. 7[7]

Juror No. 7 stated the target juror indicated an unwillingness or lack of desire to follow the law, allowed penalty or severity of the charge to enter into deliberations, and discussed jury nullification. (Williams RT 1329, 1331-1332.) Juror No. 7 clarified the target juror never expressly stated he refused to follow the law, but felt that if "he didn't believe the law, then he was willing to hang the jury." (Williams RT 1329-1330.) Juror No. 7 also stated, "[The target juror] said that's a right of the jurors that if you didn't believe the law, you were willing – you were able to hang the jury. That's my impression I got." (Williams RT 1330.) The issue of punishment was never discussed. (Williams RT 1331.) Juror No. 7 concluded:

> " . . . At this point, I don't believe – that's what I – in fact, I looked him straight in the eye when I leave that I want to have that feeling that it was just an honest disagreement. When we left yesterday, no, I didn't feel like it was an honest disagreement." (Williams RT 1333.)

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[7] In the Reporter's Transcript, it appears the actual Juror No. 7 was identified as Juror No. 6, presumably because this was the sixth juror to be questioned regarding the issue of juror misconduct. However, because the actual Juror No. 6 is the target juror, respondent refers to the sixth juror to be questioned as Juror No. 7. Also, the court reporter later referred to sixth juror to be questioned as Juror No. 7. (Williams RT 1333.)

i. Juror No. 9

Juror No. 9 stated there was a male juror who "didn't seem to agree that that was, you know, what the law really says," did not like the law, and considered the issue of the severity of the charge at the beginning of deliberations. (Williams RT 1334-1335, 1338-1339.) Juror No. 9 also mentioned the target juror understood the law, refused to follow it, did not have an open mind, believed that, based on his interpretation of the law, there was insufficient evidence to prove first-degree murder, and implied that he used a standard different from proof beyond a reasonable doubt. (Williams RT 1335-1336, 1340.)

j. Juror No. 10

Juror No. 10 stated the target juror expressed an unwillingness to follow the law and believed this juror applied a higher standard than proof beyond a reasonable doubt. Juror No. 10 based this opinion on the target juror's "statements that he didn't agree with what the law was, after we read it to him and wrote it on the board, he had a disregard for it. He put in his own words how he thinks it should be." (Williams RT 1341-1342.) The target juror interpreted the words to mean something else, understood what the words meant, and refused to follow it. (Williams RT 1342-1343.) The target juror "read more into it" and added words to the law to reflect how he thought the law should read. (Williams RT 1343.) The target juror was asked whether he had a

social agenda because he "kept referring to past cases" that the other jurors believed were irrelevant. The issue of penalty was never discussed. Juror No. 10 concluded, "[The target juror] didn't believe the evidence showed first degree murder should be the charge." (Williams RT 1346.)

k. Juror No. 11

Juror No. 11 stated the target juror indicated an unwillingness to follow the law because he had a different interpretation of the law, applied a standard that was different from beyond a reasonable doubt, and discussed jury nullification. (Williams RT 1347-1349.) However, the target juror never expressly stated he would engage in jury nullification. (Williams RT 1348, 1350.) The target juror "felt that the charge of murder was too strong in this case, and he said that there have been cases all along where you may not have felt where the charge was, you know, appropriate for whatever that person may have done." (Williams RT 1348-1349.) The target juror also "had his position, and that was it." Although the issue of penalty was never discussed, the seriousness of the charge was considered. (Williams RT 1351-1352.) In response to whether the juror listened to discussions, Juror No. 11 stated:

> "I mean, I'm assuming he didn't [close his ears], but he didn't look at what we were writing a lot of the times. [¶] Some of us had to turn around to see what the foreman was putting up on the board. It didn't appear that

> he was paying attention to that. [¶] I saw him doodling a lot on his pad." (Williams RT 1352.)

1. Juror No. 12

Juror No. 12 felt the target juror indicated an unwillingness to follow the law based on the juror's personal interpretation of the law, applied an "absolute proof" standard, and discussed what other juries may have done in other cases. (Williams RT 1353-1355.) The target juror never expressly stated he understood the law and would not follow it. (Williams RT 1355-1356.) Also, the target juror "was being harder" on the evidence than proof beyond a reasonable doubt and did not believe the evidence persuaded him beyond a reasonable doubt. (Williams RT 1356.)

4. The Trial Court's Ruling

After entertaining arguments from the parties, the trial judge ruled he would dismiss the target juror because of bias. (Williams RT 1359.) Outside the presence of the jury, the trial court explained:

> " . . . His bias is shown in a number of ways, by the fact that he added his own words to the court's instructions as to what the law is. That indicates where his mind is bent towards and that is biased against the prosecution in the matter.
>
> "His repeating of the severity of the charge in conjunction with his bringing up

> the subject of juror nullification establishes his state of mind that he's bent in that regard, that he's concerned about the severity of the charge, which means the severity of the punishment. They really are interchangeable in this context. [¶] When he talks about evidence and the severity of the charge and burden of proof. When I asked him what burden of proof he was relying on, he said it was a very, very convinced beyond a reasonable doubt. [¶] Clearly, from the evidence presented here that it's higher than beyond a reasonable doubt because the charge is murder.
>
> "He also disagrees with the felony murder rule. That's clear from the juror's response. [¶] He's dishonest to me in stating that no juror including himself had discussed the severity of the charge, had not discussed jury nullification. [¶] Some jurors didn't hear that. We're not talking about him hearing another juror discuss those issues, it's whether he discussed those issues, and he was dishonest in court. [¶] And again, I don't like to do this, but, in my opinion, he was lying in court. He has no business being a juror in this matter, and he is dismissed." (Williams RT 1360-1361.)

In the presence of the jury, the trial court excused the target juror and replaced him with an alternate juror. (Williams RT 1362.) The jury was instructed not to consider the replacement for any purpose. (Williams RT 1363.)

B. Applicable Law

Section 1089 provides in pertinent part:

> "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

Code of Civil Procedure section 233 specifies that a juror may be substituted at anytime before the jury returns a verdict if upon "good cause shown to the court [the juror] is found to be unable to perform his duty." (*People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Holloway* (1990) 50 Cal.3d 1098, 1111-1112; *People v. Burgener* (1986) 41 Cal.3d 505, 519.)

"A juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict." (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484; *People v. Farris* (1977) 66 Cal.App.3d 376, 386; *People v. Compton* (1971) 6 Cal.3d 55, 59-60.) Moreover, as CALJIC No. 1.00 explains, the jury must follow the law as the court instructs. (Williams CT 213-214.) If a juror loses the ability to render a fair and unbiased verdict, the court may discharge that juror. (*People v. Thomas, supra,*

218 Cal.App.3d at pp. 1484-1485; *People v. Farris, supra,* 66 Cal.App.3d at p. 386; *People v. Compton, supra,* 6 Cal.3d at p. 60.)

Good cause to discharge a juror exists when an impaneled juror "loses the ability to render a fair and unbiased verdict" (*People v. Farris, supra,* 66 Cal.App.3d at p. 386) or is unable to follow instructions. (*People v. Collins, supra,* at p. 696.) A juror's inability to perform his or her duties must appear in the record as a "demonstrable reality" and will not be presumed. (*People v. Lucas* (1995) 12 Cal.4th 415, 469; *People v. Beeler* (1995) 9 Cal.4th 953, 975; *People v. Thomas, supra,* 218 Cal.App.3d at p. 1484.)

Once a court is put on notice that good cause may exist, the court must conduct, as appropriate, a hearing to determine whether the juror should be discharged. (*People v. Ray* (1996) 13 Cal.4th 313, 343; *People v. Sanders* (1995) 11 Cal.4th 475, 540; *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856.) The hearing need not be formal for "it is up to the trial court to determine the appropriate procedure to follow when a question arises about a juror's continued service." (*People v Delamora, supra,* 48 Cal.App.4th at p. 1856; *People v. McNeal* (1979) 90 Cal.App.3d 830, 837.)

A hearing provides a court with the ability to observe a juror's demeanor which it may take into consideration in evaluating whether good cause exists for discharge. (*People v. Lucas, supra,* 12 Cal.4th at pp. 488-489 [court properly relied upon juror's

demeanor in deciding that juror could not fairly deliberate]; *People v. Beeler, supra,* 9 Cal.4th at p. 989; *People v. Kurbegovic* (1982) 138 Cal.App.3d 731, 760 [court relied upon juror's demeanor in deciding whether challenge for cause should be granted].)

A court's finding of good cause to discharge a juror is reviewed under the deferential abuse of discretion standard. (*People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Lucas, supra,* 12 Cal.4th at p. 489; *People v. Beeler, supra,* (1995) 9 Cal.4th 953, 975.) The determination of a question committed to the sound discretion of the trial judge will not be disturbed on appeal absent a showing the decision "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Lopez* (1993) 13 Cal.App.4th 1840, 1844, quoting *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "If there is any substantial evidence supporting the trial court's decision [to discharge a juror for good cause], [the reviewing court] will uphold it." (*People v. Marshall, supra,* 13 Cal.4th at p. 843; *People v. Beeler, supra,* 9 Cal.4th at p. 975; *People v. Turner* (1994) 8 Cal.4th 137, 205.) A court's determination of good cause for a juror's discharge "will seldom be successfully challenged." (*People v. Dell* (1991) 232 Cal.App.3d 248, 256.)

C. The Trial Court Properly Removed Juror No. 6 For His Bias Against The Prosecution

"What constitutes 'actual bias' of a juror varies according to the circumstances of the case." (*People v.*

Nesler (1997) 16 Cal.4th 561, 580; see also *In re Carpenter* (1995) 9 Cal.4th 634, 653-654.) In *Nesler,* the California Supreme Court noted:

> "In assessing whether a juror is 'impartial' for federal constitutional purposes, the United States Supreme Court has stated: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. [Citation.] The theory of the law is that a juror who has formed an opinion cannot be impartial. . . . An impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial." (*People v. Nesler, supra,* 16 Cal.4th at pp. 580-581.)

Under California law, "actual bias" is defined as

> "'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' [Citations.] A sitting juror's actual bias that would have supported a challenge for cause also renders the juror unable to perform his or her duties and thus subject to discharge. [Citation.] 'Grounds for . . . discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and

are reported by fellow panelists." (*Id.* at p. 581.)

Here, after a proper and thorough examination of the matter, the trial court concluded the target juror was biased and had not been forthcoming with the court and removed him from the jury. The trial court explained the target juror's bias was made apparent through his statements and conduct. Specifically, the target juror did not agree with the way appellant Williams was charged because he was influenced by the severity of the punishment and applied a higher standard of proof. (Williams RT 1360-1361.) Substantial evidence supports the trial court's findings.

Juror Nos. 2, 3, 5, 7, 9, 10, and 11, testified that while Juror No. 6 did not explicitly state he would not follow the law, he disagreed with the law because the punishment should not be the same for a coconspirator and applied a higher standard of proof against the prosecution. (Williams RT 1302-1303, 1309-1316, 1324-1325, 1329-1330, 1335-1336, 1340-1343, 1348-1349, 1356.) In fact, the target juror specifically stated there were always cases where the charge was inappropriate for the crime. (Williams RT 1349-1349.) Here, Juror No. 6 was biased because he did not believe the penalty or punishment should be the same for a co-conspirator. In addition, Juror No. 6 discussed dissatisfaction with the charges in the context of juror nullification. (Williams RT 1302-1303, 1309-1316, 1324-1325, 1329-1330, 1335-1336, 1340-1343, 1348-1349, 1356.) The prejudice to the substantial rights of the People that results from this bias is

similar to that where a member of the venire who fails to disclose that the death penalty would influence his or her deliberations. (*People v. Keenan* (1988) 46 Cal.3d 478, 532 [juror may be discharged for bias where views on capital punishment would substantially impair performance of duties]). Thus, the trial court properly discharged Juror No. 6 for bias.

Appellant Williams also argues the trial court's investigation of the juror misconduct was excessive and improper. (Williams AOB 9-15.) Again, respondent disagrees.

It is well-settled that investigations of juror misconduct "should be complete enough to determine 'good cause.'" (*People v. McNeal* (1949) 90 Cal.App.3d 830, 837; see also *People v. Keenan, supra,* 46 Cal.3d at p. 532; *People v. Burgener* (1986) 41 Cal.3d 505, 519-520.) Indeed, failure to conduct an inquiry sufficient to the occasion is an abuse of discretion. (*People v. Keenan, supra,* 46 Cal.3d at p. 532; *People v. Burgener* (1986) 41 Cal.3d 505, 519-520.) Here, the trial court allowed a more thorough hearing in order to give defense counsel the opportunity to establish a record. (Williams RT 1289.) By questioning the entire jury, the trial court properly conducted an inquiry sufficient to the occasion. Appellant Williams's claim must be rejected.

* * *

[Declaration Of Service Omitted In Printing]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. **TARA WILLIAMS,** *Defendant and Appellant.*	B137365 NA039425

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES COUNTY
Honorable William T. Garner

APPELLANT'S REPLY BRIEF

(Filed Oct. 2, 2000)

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* * *

I

THE COURT ABUSED ITS DISCRETION IN DISCHARGING THE LONE HOLDOUT JUROR BECAUSE ALL THE FACTS AND CIRCUMSTANCES REVEAL THERE WAS NO "SUBSTANTIAL EVIDENCE" ESTABLISHING "ACTUAL BIAS" AND HIS INABILITY TO PERFORM HIS DUTIES AS A "DEMONSTRABLE REALITY" AND HIS VOTE WAS THE RESULT OF HIS BELIEF THE PEOPLE FAILED TO PROVE GUILT BEYOND A REASONABLE DOUBT

Appellant has set forth **sixteen reasons** why the court clearly and necessarily abused its discretion in discharging Juror No. 6, the lone juror holding out for acquittal who committed no "serious and willful" misconduct constituting "good cause" to conclude he was unable to perform his functions as a juror as a "demonstrable reality" and instead refused to vote "guilty" because he believed the People failed to prove guilt beyond a reasonable doubt. Except regarding the extent of the court's ability to inquire, about which he incorrectly suggests inquiry may continue indefinitely without regard to the fact the initial and subsequent inquiries demonstrate no misconduct as long as further impermissible inquiry ultimately reveals some purported misconduct (RB 42), **the Attorney General does not bother to discuss any of these reasons**, let alone attempt to show appellant is not absolutely correct that they lead to the undeniable conclusion appellant's Sixth Amendment

right was violated and her conviction must be reversed.

Again, the sixteen reasons are:

(1) the initial inquiry of the foreperson after the court received the jury's note clearly revealed Juror No. 6 committed no misconduct and his concerns were solely about the insufficiency of the evidence and the matter should have ended there, particularly given that the prosecutor expressed no concerns whatsoever that the foreperson's answers revealed misconduct, let alone made a request that the court inquire further;

(2) the People's "Motion To Question Juror For Bias" should have been denied for lack of a factual basis warranting further inquiry because the motion was based solely on the jury's note, no additional information was brought to the court's attention through the motion and the motion made assertions and allegations which the foreperson's responses had already shown were totally unfounded;

(3) if inquiry should not have stopped after the initial questioning of the foreperson revealed Juror No. 6 had committed no misconduct and his concerns were solely and exclusively about the People's failure to adduce evidence sufficient to establish appellant's guilt beyond a reasonable doubt, it necessarily should have stopped after the foreperson was questioned a second time and conceded it was nothing more than his "belief," "opinion," "feeling" and "leading hypothesis" that Juror No. 6 was acting improperly and Juror No. 6 had made **no explicit statement** supporting

the conclusion he was unwilling to follow the law or applying a different standard of proof;

(4) if inquiry should not have stopped after the foreperson conceded Juror No. 6 had said absolutely nothing affirmative which could reasonably be characterized as misconduct, inquiry should have stopped after of Juror No. 6 revealed he "never even heard the word 'punishment' used" in deliberations, believed "whether it's first degree murder or not [all criminal trials] should have the same burden of proof," agreed with the reasonable doubt instruction "as I understood it," which was "there's always some possible doubt in any human affair, but if you have a reasonable doubt based on the evidence and only on the evidence that was presented at the trial, if you have a reasonable doubt about a defendant's guilt, under the law, you are required to vote not guilty" and believed jurors "should not use juror nullification" and "[t]hey should base their decisions on the evidence that was presented at a particular trial and only on that evidence" because these answers were consistent with those given by the foreperson and dispelled any suggestion of misconduct;

(5) rather than demonstrating he had committed misconduct, Juror No. 6's statements ("I can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt" and "[o]ther than that, I did not make a reference to the severity of the case – the severity of the charge," "it's a good idea to pay particular attention to what evidence was

presented at the trial and make sure before we decide on a verdict, that we are convinced – if the verdict is guilty, that were are convinced beyond a reasonable doubt by the evidence that was presented at the trial" and "I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt" because "it's the same thing") revealed this juror understood the law, but that he approached his duties as a juror seriously and conscientiously;

(6) belated inquiry of additional jurors after the court had initially inquired of the foreperson and correctly concluded there was no misconduct impermissibly resulting in an inquiry into the substance of the jury's deliberations and the thought processes of the individual jurors;

(7) other than his repeated statements that the People had not adduced sufficient evidence to prove appellant's guilt beyond a reasonable doubt, the jurors admitted they were not relating statements made by Juror No. 6 but were instead expressing their "feeling" or "belief" as to what Juror No. 6 may have been thinking or doing based ultimately upon the mere fact he refused to agree with their assessment of the evidence and join with them in finding appellant's guilty;

(8) the court employed a different standard when assessing the credibility of the jurors as when defense counsel noted Juror No. 2's answers were contrary to those given by the foreperson and Juror

No. 1 and if Juror No. 2 was being truthful, the foreperson and Juror No. 1 necessarily were lying and further noted if Juror No. 6 was to be excused for "dishonesty," both the foreperson and Juror No. 1 should similarly be excused, as to the other jurors the court found "[y]ou are going to obviously get nuances what people hear and understand" and these jurors were simply "recalling events as they remember them" while as to Juror No. 6 the court found he "is lying";

(9) there was no evidence whatsoever that Juror No. 6's doubts rested upon "fixed categorical preconceptions which prevent him from weighing and deliberating over the evidence or following the court's instructions" or he otherwise harbored some "immutable, categorical hostility to the basic premise of the case" as his statements ("this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt" and "it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced – if the verdict is guilty, that were are convinced beyond a reasonable doubt by the evidence that was presented at the trial") reflected only his keen understanding of both the importance of the task and the standard of proof to be applied;

(10) there was no factual basis, let alone "substantial" evidence, supporting the court's finding that Juror No. 6 was "a biased juror" against the prosecution because he "added his own words to the court's instructions as to what the law is" and was "using an

illegal standard to convict" as "[h]is standard is very convinced beyond a reasonable doubt," "repeat[ed] the severity of the charge in conjunction with his bringing up the subject of juror nullification," "disagrees with the felony murder rule" and was "dishonest" to the court "in stating that no juror including himself had discussed the severity of the charge, had not discussed juror nullification" because the evidence was instead that Juror No. 6 (a) was using the correct legal standard and, in so doing, simply had a view of the sufficiency of the evidence which was not shared by the others, (b) did not "bring up" the subject of nullification or discuss the severity of the charge in that context, but instead made one isolated reference to the reality of nullification in response to another juror, (c) was **not asked** whether "nullification" was "discussed," but rather whether he was of the opinion jurors have the right to nullify (to which he unequivocally answered he did not) and there was no evidence of dishonesty in his replies to the court's questions and (d) had not "made reference during deliberations to the severity of the charge," but rather informed the court that "severity" was the reason why "we should be very convinced" that if the defendant is found guilty that it is beyond a reasonable doubt;

(11) the stated grounds when the prosecutor asked the court to remove Juror No. 6 were "[h]e's not being forthcoming to the court" about whether the jury had discussions about "severity" and "nullification" and these grounds were baseless because the record clearly reveals the court **never asked** Juror

No. 6 whether the issue of nullification was "discussed" by the jurors and **never asked** Juror No. 6 whether the issue of severity was "discussed" by the jurors (RT 1279-1280);

(12) although the prosecutor additionally asked the court to remove Juror No. 6 on the ground "the foreperson told us that there was an explicit unwillingness by this individual to follow the law in 6.10.5" and "[h]e was instructed he must follow the law, and he explicitly stated he wouldn't follow the law" (RT 1284), the record again belies this assertion as the foreperson unequivocally stated "there has been **no explicit statement on his part** that would support that" conclusion and this was no more than his "feeling" or "leading hypothesis" and the court's answer to the question "eliminated that aspect" (RT 1268-1269; emphasis added) and nowhere is there any statement whatsoever made by or attributed to Juror No. 6 which was an explicit or affirmative statement of unwillingness to follow the law, let alone any other statement from which any such unwillingness could reasonably be inferred;

(13) it was patently improper for the court to conclude "[i]f you focus on the seriousness of the offense, **an inference can be drawn** that the juror is requiring more than proof beyond a reasonable doubt" as that inference was not logical on the facts then before the court and wholly speculative in that the reasonable inference regarding this or any other juror's concern about the "seriousness" or "severity" of the offense was instead that the juror was "going to

be extremely sure that there is proof beyond a reasonable doubt" **precisely because** the offense was serious or severe;

(14) there was no substantial evidence that Juror No. 6 was using "a higher standard coupled with the severity of the charge" (RT 1285) as the record reveals only that he made a statement regarding the **importance of having proof beyond a reasonable doubt** because the task of determining guilt or innocence was "serious" or "severe" and **every response** to the questions posed revealed no more than he took his responsibility as a juror very seriously;

(15) there was no substantial evidence supporting the court's finding Juror No. 6 was "a biased juror" against the prosecution as (a) regarding the standard of proof all other jurors **conceded** Juror No. 6 never made any statement indicating he was employing any standard other than the applicable standard of proof and it was only because they did not understand why Juror No. 6 did not reach the same conclusion they had reached that they felt, believed or assumed he must have been using some other standard of proof, (b) regarding "severity" and "nullification" all other jurors **conceded** Juror No. 6 never made an explicit statement regarding either topic and (c) regarding the purported dishonesty of Juror No. 6 "in stating that no juror, including himself, had discussed subject of juror nullification," there was no evidence that Juror No. 6 "was dishonest when he stated that no juror, including himself, had discussed the topic of the seriousness of the charge or the case"

(RT 1297) because **he was not asked whether the issue was "discussed" by the jurors**; and

(16) what happened here was clearly that the jurors who were voting to convict appellant tried to browbeat into submission the lone dissenter who entertained a reasonable doubt and, when they were unsuccessful, cried "misconduct" not based upon anything Juror No.6 actually said, but rather upon their subjective "feeling," "belief" or "impression" gleaned from his refusal to reach the same verdict they had reached, revealing Juror No. 6 was ultimately discharged because the other jurors expressed frustration in being unable to persuade him to vote guilty and the court impermissibly acceded to their wishes and impermissibly allowed them to exercise control over the composition of the jury.

Rather than advancing a meaningful discussion of the relevant facts and authorities, the Attorney General instead displays his customary cavalier attitude regarding a valuable constitutional right. To this end, he simply summarily asserts the court "concluded the target juror was biased and had not been forthcoming with the court" in that he "did not agree with the way appellant Williams was charged because he was influenced by the severity of the punishment and applied a higher standard of proof." Although **conceding none of the other jurors testified Juror No. 6 stated he refused to follow the law**, as the "substantial evidence" supporting these findings he thereafter argues simply "Juror No. 6 was biased because he did not believe the penalty or punishment

should be the same for a co-conspirator" and "discussed dissatisfaction with the charges in the context of juror nullification." (RB 41-42.)

In each of the reasons above, particularly reasons (5), (10), (11), (12) and (14), appellant has shown there is no evidence, substantial or otherwise, to support these assertions. That the Attorney General cannot offer any other factual basis effectively concedes the court abused its discretion in discharging Juror No. 6.

That which the Attorney General additionally does not attempt to address further supports this conclusion.

First, regarding the different standard employed by the court in assessing credibility, he does not discuss that while all the jurors were together whenever any statement was made the other jurors were simply deemed to be doing the best they could when they contradictorily testified regarding whether a particular statement was made but Juror No. 6 was labeled a "liar" when, consistent with the testimony of some of the other jurors, he testified a particular statement was or was not made. Nor does he discuss that every juror admitted Juror No. 6 **never made any affirmative statement about any of the matters upon which the court ultimately based his discharge** and instead each such juror stated or intimated his frustration with Juror No. 6 was for Juror No. 6 not voting to convict appellant as they had decided to do, which not only makes their protestations of "misconduct" inherently suspect, but shows the court abused

its discretion in not evaluating Juror No. 6 in the same manner as it did the others.

Second, regarding the fundamental rule that a court cannot discharge a juror because he has a legitimate disagreement with the other jurors regarding the sufficiency of the evidence, the Attorney General does not mention, let alone attempt to or distinguish, any of the cases cited by appellant. (See **People** v. **Castorena** (1996) 47 Cal.App.3d 1051, 1066, **People** v. **Hightower** (2000) 77 Cal.App.4th 1123, 1147 and **People** v. **Hamilton** (1963) 60 Cal.2d 105, 128.) Nor, more importantly, does he attempt to assess the court's decision to discharge Juror No. 6 in light of the reality "that a juror may not be removed because he or she disagrees with the other jurors as to the merits of the case requires no citation" and "removal of the sole holdout for acquittal is an issue at the heart of the trial process and **must be meticulously scrutinized**." (**United States** v. **Hernandez** (2d Cir. 1988) 862 F.2d 17, 23; emphasis added.)

Third, regarding the inference underlying the very "fact" found to justify discharge – that "[i]f you focus on the seriousness of the offense, an inference can be drawn that the juror is requiring more than proof beyond a reasonable doubt" – the Attorney General does not attempt to show that inference was not illogical on the facts then before the court as well as wholly speculative and, as such, there accordingly was no "substantial evidence" justifying the court's exercise of discretion and reversal is required for this reason alone.

Fourth, regarding whether "serious," "wilful," "wanton" or "reckless" misconduct had been established by substantial evidence, the Attorney General does not answer how a besieged holdout juror making an isolated comment in response to another juror's question on the second day of deliberations after repeatedly explaining why he believed the evidence was insufficient to convict constitutes such misconduct, obviously because it does not.

It was clear that Juror No. 6, the lone holdout for acquittal, did no more than question whether the evidence was sufficient to prove appellant's guilt beyond a reasonable doubt. As such, there was no evidence, "substantial" or otherwise, establishing his inability to perform his functions as a juror "as a demonstrable reality." The court clearly and necessarily abused its discretion in discharging Juror No. 6. Appellant was accordingly denied her Sixth Amendment right to a unanimous jury, requiring her conviction to be reversed.

* * *

[Declaration Of Service Omitted In Printing]

Filed in the California Court
of Appeal on Sept. 17, 2001
Case No. B137365

LAW OFFICES OF
BRUCE DANIEL ROSEN

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September 15, 2001

Joseph A. Lane, Clerk
Court of Appeal
Second Appellate District
Division Three
300 South Spring Street
Los Angeles, California 90013-1213

Re: ***People v. Williams***; B137365; NA039425

Dear Clerk Lane:

This letter is in response to the Court's August 16, 2001 Order requesting supplemental letter briefs regarding the effect of *People v. Cleveland* (2001) 25 Cal.4th 466 on this appeal. As the follow clearly demonstrates, *Cleveland* reveals the court abused its discretion in discharging Juror No. 6, the lone holdout for acquittal who refused to vote "guilty" simply because he believed the People had failed to prove appellant's guilt beyond a reasonable doubt, and appellant's conviction must accordingly be reversed.

Cleveland

On the second day of deliberations, the jury sent the court a note stating:

> "[w]e request an alternate to replace one juror. One juror does not agree with the charge and does not show a willingness to apply the law. One juror will not abide by the facts and apply the law. Please provide direction in this matter."

(*Cleveland, supra*, 25 Cal.4th at p. 470.) The foreperson explained this juror:

> "could not even agree that a crime had been committed. It was no fault, no foul, and we are having a hard time attempting to have this person even, quote, unquote, apply the law in the five steps where it is outlined in the documents that you gave us to read where it goes to the five points of what is attempted robbery."

(*Ibid.*) The foreperson added this juror:

> " . . . doesn't feel that there is a valid charge. That *he cannot in all fairness and conscience state that there was any evidence to support that* the defendant allegedly came in an was attempting to get the weapon that allegedly was behind the counter underneath the cash register."

(*Ibid.*; emphasis added.)

When the court asked the foreperson whether this juror had "made up his mind prior to deliberations

and was refusing to discuss the case," the foreperson replied "I don't know if I could say that their [sic] mind was made up before we went into the room" and explained when other jurors asked this juror to discuss his position he responded:

> "[y]ou're not going to sway my mind, this is what I feel in conscience in looking at the big picture, no fault no foul, there's pushing and shoving on every football filed, and the conversation goes from that point. [¶] Does not want to discuss the five points of the law as to attempted robbery . . . "

(*Cleveland*, *supra*, 25 Cal.4th at pp. 470-471.) The foreperson added this juror stated "*I cannot in conscience look at the evidence rendered* and state that the person was really after the gun." (Id., at p. 471; emphasis added.) When asked whether this juror listened to the other jurors, the foreperson answered "[h]alfheartedly and then interrupts." (*Ibid.*)

The foreperson and nine other jurors raised their hands when the court thereafter asked the jury whether any juror felt another was not deliberating. The court individually questioned the nine jurors, who stated:

> – the elements of the offense "do not seem to matter to this juror and he would discuss "elements . . . that had nothing to do with the facts of the case at hand"

– the others "didn't get anywhere" with this juror because he "had an interpretation, and the rest of us have a different interpretation"

– this juror "isn't applying the law" and "[i]t's strictly his own personal opinion"

– regarding questions by the others about the elements of the crime this juror "responds, 'I cannot answer with a yes or no,' and goes into a really big synopsis of what he speculates" and "concludes with his own opinion and is clearly not taking the law into consideration"

– this juror was "not even acknowledging that the defendant was trying to get a gun"

– this juror "has absolutely no interest in the law, your instructions, what we are supposed to consider, and is making judgments and speculations based on his personal feelings"

– this juror stated "we shouldn't even be here, this should not have even come to court, this is a minor incident which any of us could have done"

– this juror "talks and talks and talks about everything except what we are supposed to be dealing with"

– this juror "won't answer questions" and "[w]e are allowing him a chance to talk, and he talks about 15 minutes, and he even brings up things like police cars and reminded him

of Rodney King and all that stuff, and I told him that had nothing to do with this"

– in response to others asking him a "particular question," this juror would say "I've said all I want to say, I won't answer no questions"

– this juror "is not following the instructions" and "contradicts everything that we say, and he . . . doesn't want to go by the rules of the court and the laws"

– this juror was "disregarding the facts altogether" and "won't answer the questions" and "goes off on a tangent or something else every time"

– this juror appeared to be "disregarding the evidence . . . for some unknown reason" and would not participate in the discussion of the elements of the crime

– this juror "doesn't even seem to take [the elements of the crime] into consideration" and "he had his own agenda, and he doesn't seem to take those into consideration, so you can't even discuss it"

– this juror "keeps referring to he has to vote his own conscience"

– this juror would state "this is my opinion and you have a right to your own opinion."

(*Cleveland*, *supra*, 25 Cal.4th at pp. 471-473.)

The court next questioned this juror. In response to whether he was participating in deliberations, this juror answered:

> "Yes, I certainly think I do, been participating in it for about a day, roughly. I have listened to other people, and they have listened to me. I have asked them to please be a little quiet. *I present the whole case as I see it in its totality. I didn't want to go into the details of the case and mislead each other by arguing about various little things the way each juror sees it. I tend to present my views of the whole picture, and if the other jurors, of course, don't like that view, the I just have to go with my own conscience.*"

(*Cleveland*, *supra*, 25 Cal.4th at p. 473; emphasis added.) He added "I have no problem with the law" but "I have only *problems with the facts as I perceive them.*" (*Ibid.*; emphasis added)

The court thereafter dismissed this juror over defendant's objection. The court reasoned:

> "I do find that he is not functionally deliberating with the other jurors, that they would ask him specific questions as to the elements and facts, and he refused to respond, and you can't have a meaningful discussion unless you discuss what the particular facts and elements are. It doesn't do any good to talk in generalities as he does want to, so he is excused."

(*Cleveland*, *supra*, 25 Cal.4th at p. 473.) Division Seven reversed, holding the trial court "violated appellant's

right to a unanimous jury by dismissing a 'holdout' juror and failing to develop a record showing beyond a 'doubt' and by a 'demonstrable reality' the dismissed juror's failure to deliberate and prejudging the evidence." (*Id.*, at pp. 473-474.)

The California Supreme Court first noted that many of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes "apply even more strongly when such inquiries are conducted during deliberations" because jurors may be "particularly reluctant to express themselves freely in the jury room if their mentla processes are subject to immediate judicial scrutiny" and "[t]he very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Cleveland*, *supra*, 25 Cal.4th at p. 476.)

After reviewing relevant state and federal cases, including *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606 and *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080), the Court stated "[w]e agree with the observations in *Brown*, *Thomas* and *Symington* that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence." (*Id.*, at p. 483.) The Court then made clear that:

> " . . . the numerous decisions discussed above nonetheless support our conclusion that *a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible*, to avoid

intruding unnecessarily upon the sanctity of the jury's deliberations. *The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations.* Additionally, *the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper grounds for discharge exists.* We also observe that *permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted.*"

(*Id.*, at p. 485; emphasis added.)

Cleveland thereafter concluded:

" . . . proper grounds for removing a deliberating juror include refusal to deliberate. A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in the discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. *The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate*

> *and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not grounds for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate simply because the juror expresses the belief that further discussion will not alter his or her view."*

(*Cleveland, supra*, 25 Cal.4th at p. 485; emphasis added.) Applying these principles, the Court found the trial court abused its discretion in discharging this juror because, notwithstanding the jury's initial note, "it became apparent under questioning that *the juror simply viewed the evidence differently* from the way the rest of the jury viewed it" and "individual questioning of the jurors revealed that *it was the conclusion arrived at by Juror No. 1 that was at issue.*" (Id., at pp. 485-486; emphasis added.)

The Court then concluded:

> "It is possible that Juror No. 1 employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that he refused to deliberate. Juror No. 1 participated in deliberations, attempting to explain, however, inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even

> if less than sympathetically, to the contrary views of his fellow jurors."

(*Cleveland*, *supra*, 25 Cal.4th at p. 486.) It was under these circumstances that the Court found the trial court abused its discretion in discharging the juror and reversal was required.

Analysis

Numerous express and unequivocal statements in *Cleveland* make clear the discharge of Juror No. 6 was an abuse of discretion and appellant's conviction must necessarily be reversed.

First, *Cleveland* states "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*Cleveland*, *supra*, at p. 485.) The scope of inquiry here, however, was anything but limited. Rather, the court twice questioned the foreperson, Juror No. 6 and all the other jurors notwithstanding that initial inquiry of the foreperson in response to the jury's note revealed Juror No. 6 *never* expressed concern about punishment (the purported act of misconduct), did not disagree with the law but instead he had a legitimate question about one jury instruction which the court had since answered and "probably ten or fifteen times" during deliberations said that he did not believe "that there's sufficient evidence" for conviction (RT 1251.)

Second, *Cleveland* states "the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper grounds for discharge exists." (*Cleveland*, *supra*, at p. 485.) Here, the court granted the People's subsequently-filed "Motion To Question Juror For Bias" even though this motion was based solely on the jury's note, no additional information was brought to the court's attention through the motion, the motion simply made assertions and allegations the foreperson's responses from the previous day had shown were totally unfounded and the foreperson had clearly stated "probably ten or fifteen times" Juror No. 6 had "expressed that he doesn't believe that there's sufficient evidence." As such, the matter necessarily should have ended after the foreperson's initial questioning.

Third, *Cleveland* states "[t]he inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (*Cleveland*, *supra*, at p. 485.) Here, the focus was not on the "conduct" of deliberations. Nor was it simply on the "content" of deliberations. Rather, it was on the other jurors' "beliefs," "opinions," "feelings" and "hypotheses" in a case where they all conceded Juror No. 6 never stated he was unwilling to follow the law, never stated he was applying a standard of proof different or higher than beyond a reasonable doubt, never stated he was engaging or would engage in juror nullification and repeatedly stated – "probably ten or fifteen times" –

that he did not believe there was sufficient evidence to justify a conviction.

Fourth, *Cleveland* states "[t]he circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge," "the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not grounds for discharge" and "[a] juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate simply because the juror expresses the belief that further discussion will not alter his or her view." (*Cleveland*, *supra*, 25 Cal.4th at p. 485.) Here, the foreperson conceded Juror No. 6 repeatedly attempted to explain to the other jurors the basis for his reasonable doubt and other jurors had tried to persuade him that "his current view is incorrect." (RT 1271-1272.) Accordingly clear is Juror No. 6 was actively participating in deliberations and the concern of the other jurors was simply and exclusively that his conclusion was contrary to theirs.

Fifth, *Cleveland* states "permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted." (*Cleveland*, *supra*, at p. 485.) Here, although there was no extraordinary reason to allow them to

do so, the court allowed the prosecutor and defense counsel to question the jurors.

Conclusion

Cleveland has made clear that a juror who, unlike the others, views the evidence adduced and interprets the instructions read in a manner which leads him to conclude the evidence is insufficient to convict the accused does not thereby commit "misconduct" and cannot legally he discharged. Appellant was accordingly denied her Sixth Amendment right to a unanimous jury when Juror No 6 was discharged after actively participating in deliberations during which he "probably ten or fifteen times" said that he did not believe "that there's sufficient evidence" for conviction. Her conviction must be reversed.

Respectfull submitted,

Law Offices Of
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Bruce Daniel Rosen
Attorney at Law

Attorney for Appellant

[Declaration Of Service Omitted In Printing]

Filed in the California Court
of Appeal on Sept. 17, 2001
Case No. B137365

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September 17, 2001

The Honorable Joan D. Klein, Presiding Justice
and Honorable Associate Justices
California Court of Appeal
Second Appellate District, Division Three
300 South Spring Street
Los Angeles, California 90013

RE: PEOPLE v. CARDE TAYLOR
and TARA WILLIAMS, B137365
SUPPLEMENTAL LETTER BRIEF

Dear Honorable Presiding Justice Klein
and Associate Justices:

Pursuant to this Court's Order of August 16, 2001, respondent submits the following letter brief for consideration. The California Supreme Court remanded this case with directions to vacate the decision and reconsider the cause in light of *People v. Cleveland* (2001) 24 Cal.4th 466. This Court requested supplemental letter briefs addressing the effect of the *Cleveland* decision on this case.

The issue presented is whether, pursuant to *People v. Cleveland*, the trial court in the instant case abused its discretion in its inquiry into alleged juror misconduct, and its ultimate decision to discharge a juror. Respondent submits the trial court conducted a proper inquiry, and that the discharge of Juror No. 6, who lied to the court and repeatedly expressed an unwillingness to follow the law, was proper and within the court's discretion.

In *People v. Cleveland*, the California Supreme Court examined the proper scope of a trial court's inquiry into alleged juror misconduct, and discussed permissible and impermissible grounds for discharging a juror. After surveying relevant California and federal cases, the court emphasized,

> "[W]e adhere to established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate."

(*Cleveland*, *supra*, 25 Cal. 4th at p. 484, italics added.)

Because determining whether to discharge a deliberating juror is a "delicate matter" given the sanctity of deliberations, *Cleveland* stressed that a trial court's inquiry should: 1) be as limited in scope as possible; 2) focus on juror conduct, rather than the content of deliberations; and 3) cease once the trial

court is satisfied the juror "is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct." (*People v. Cleveland*, *supra*, 25 Cal. 4th at p. 485.) The trial court's determination is reviewed for abuse of discretion, and will be upheld if supported by substantial evidence. (*Id.* at p. 474, citing *People v. Marshall* (1996) 13 Cal.4th 799, 843.) With these considerations in mind, respondent submits the trial court's inquiry was reasonable, and that it showed a "demonstrable reality" that Juror No. 6 was biased. (*Cleveland*, *supra*, 25 Cal. 4th at p. 484.)

A. The Trial Court's Inquiry Concerning Alleged Juror Misconduct Was Reasonable Pursuant to *Cleveland*

The relevant proceedings concerning the trial court's inquiry, and the ultimate discharge of Juror No. 6, were reproduced in detail at pages 23 through 37 of the Respondent's Brief. The excerpts provided here, with citations to the record, are from those proceedings that relate directly to the issue contemplated in *Cleveland*.

The trial court was first notified of possible juror misconduct when it received a note from the jury stating, a juror "1) has expressed an intention to disregard the law . . . and 2) has expressed concern relative to the severity of the charge." (Williams CT ("CT") 207; Williams RT ("RT") 1250.)

The trial court called the foreperson and asked, "Without telling us about the jury's assessment of the evidence, can you explain what is meant by 'expressed concern relative to the severity of the charge'?" When the foreperson explained that a juror "expressed that he doesn't believe there's sufficient evidence – " the trial court interrupted, explaining the parties were only interested in potential misconduct and not the jury's thought process. The juror provided no other information and the trial court ordered deliberations to resume. (RT 1251-1252.)

The following day, the prosecution requested further inquiry into the portion of the jury's question stating a juror "has expressed concern relative to the severity of the charge." (RT 1257-1262.) It was evident the foreperson had originally written the word "punishment," but had erased it and replaced it with "charge." (RT 1258.) The trial court called the foreperson and asked if the juror in question was motivated by punishment. (RT 1264-1266.) After explaining why he had erased that word, the foreperson opined, rather cryptically, that the juror in question was applying an "extraordinary standard, which is beyond reason." (RT 1267-1268.)

The trial court allowed the parties to question the foreperson, who explained that Juror No. 6 had provided historical examples of juries refusing to convict guilty parties as a form of social disobedience. (RT 1269-1270.) The foreperson also said, "There was an explicit unwillingness [by the target juror] to follow the law that was addressed yesterday with the

question and answer that he had yesterday afternoon." (RT 1271.) The foreperson also intimated that Juror No. 6 had applied a standard of proof higher than reasonable doubt and that "he has coupled that with the severity of first degree murder." (RT 1273-1274.)

The trial court called Juror No. 6, and asked whether he or any other juror had said they were motivated by potential punishment. (RT 1276-127.) Juror No. 6 denied ever hearing the word "punishment," denied that any juror was applying an excessive standard of proof, and stated a belief that "jurors should not use jury nullification." (RT 1277-1279.) Juror No. 6 further denied that any juror was considering punishment. (RT 1280.)

The trial court asked, "Just to be clear, have you made any reference during deliberations to the severity of the charge?" (RT 1280.) Juror No. 6 stated he had told the other jurors that this was a "very important case" and that the jury should be "very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." (RT 1281.) After further questioning by the court, Juror No. 6 stated he did not believe there was any difference between being "convinced" or "very convinced" of guilt beyond a reasonable doubt. (RT 1281.)

The prosecution asked if there had been discussion about jury nullification, and Juror No. 6 said that there had been. He also said that he had provided examples from history in which a law could not be

enforced because juries refused to convict those who violated it. (RT 1282.) The trial court was inclined to rule the juror had engaged in misconduct, but that it wanted to give defense counsel the opportunity to question other jurors and create a record. (RT 1288-1289.)

Upon questioning by defense counsel, Jurors No. 2, 3, 5, 7, 9, and 10, all reported that Juror No. 6 had expressed a disagreement with the law and an unwillingness to follow the law. Jurors No. 5 and 10 reported that Juror No. 6 was applying a higher standard than beyond a reasonable doubt. Jurors No. 3 and 5 also reported that Juror No. 6 had said the punishment facing defendant Williams was too severe for her actions, and that she should not receive the same penalty as the actual shooter. Juror No. 3 reported that Juror No. 6 believed the charge was "too severe . . . for what he thought was done" and that he refused to follow the law. (RT 1302-1303, 1309-1316, 1324-1325, 1329-1330, 1335-1336, 1340-1343, 1348-1349, 1356.) Following this hearing, the trial court concluded that Juror No. 6 should be dismissed for misconduct. (RT 1360-1361.)

Respondent submits the inquiry was proper. Once notified of possible misconduct, the trial court began an inquiry into the "delicate matter" of alleged misconduct. (See *People v. Cleveland*, *supra*, 25 Cal. 4th at p. 485.) The trial court appeared mindful of the concern expressed by the Supreme Court that "the inquiry should focus on the conduct of the jurors, rather than the content of the deliberations." (*Ibid*; see also

id. at p. 476 ["The very act of questioning jurors about the content of their deliberations could affect those deliberations."].) The trial court made clear at the outset that it was concerned only with juror conduct and not with the content of deliberations. (See RT 1250 ["Please don't tell us anything about a juror's analysis of the evidence"]; 1251 ["Without telling us about the jury's assessment of the evidence, can you explain what is meant by 'expressed concern relative to the severity of the charge'?"].) When the foreperson first mentioned a juror's opinion regarding the evidence, the trial court interrupted, stating, "Let me stop you there. . . . [¶] . . . Don't go on. I don't think I can inquire further on that." (RT 1251.)

Inquiry of other jurors, however, revealed Juror No. 6 indeed had expressed an unwillingness to follow the law, and was contemplating punishment in his deliberations. The trial court was not required to ignore these statements, simply because they might reveal aspects of otherwise secret deliberations. As the *Cleveland* court noted, evidence of a statement made by a juror during deliberations is generally inadmissible, however, such evidence is admissible if the statement constitutes misconduct. (*People v. Cleveland*, *supra*, 25 Cal. 4th at p. 484-485, citing Evid. Code, § 1150 and *People v. Hedgecock* (1990) 51 Cal.3d 395, 418.) Here, the statements of Juror No. 6 plainly constituted misconduct, in that they reflected a blatant unwillingness to follow the law or the trial court's instructions. By failing to impartially decide the case "solely on the evidence," Juror No. 6's

statements reflected a bias that warranted investigation and ultimate discharge from the jury. (See *People v. Nesler* (1997) 16 Cal. 4th 561, 580-581.)

The trial court did allow both parties to question the foreperson, and allowed defense counsel to question the other jurors. In dicta, the *Cleveland* court criticized this practice, noting that "permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) Although it would have been less "perilous" for the trial court to conduct all of the questioning, the inquiry as a whole was still the proper under the circumstances. The questioning by the trial court and the parties was limited to juror misconduct and did not delve into the contents of the deliberations. Moreover, as the Supreme Court noted in *Cleveland*, "'it would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath.'" (*Id.* at p. 481, citing *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 617; *see also id.* at p. 476 ["The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations."].) Finally, the inquiry ceased once the trial court was satisfied that Juror No. 6 had indeed committed misconduct. (See *id.* at p. 485.)

B. The Inquiry Established a "Demonstrable Reality" that Juror No. 6 Committed Misconduct, Pursuant to *Cleveland*

Just as in the instant case, the inquiry in *Cleveland* began when the jury submitted a note indicating a juror 'does not show a willingness to apply the law.'" (*People v. Cleveland*, *supra*, 24 Cal.4th at p. 486.) Subsequent inquiry in *Cleveland* showed no misconduct, however, revealing instead that the juror "simply viewed the evidence differently from the way the rest of the jury viewed it." (*Ibid.*) Thus, the California Supreme Court affirmed the Court of Appeal's finding that the trial court had abused its discretion in discharging the juror. (*Ibid.*) Here, however, in sharp contrast to *Cleveland*, subsequent inquiry into the jury's note *confirmed* the initial allegation that Juror No. 6 was unwilling to apply the law, and further revealed Juror No. 6 had lied to the court. (RT 1360-1361.)

As this Court noted in its first opinion, "[t]he evidentiary hearing supported a conclusion that Juror No. 6 was biased." Indeed, other jurors reported that Juror No. 6 was applying a higher standard of proof, that he explicitly stated he would not follow the law, that he disagreed with the concept of vicarious liability, and that he did not believe a co-conspirator should receive the same penalty as one who committed the target offense. (RT 1302-1303, 1309-1316, 1324-1325, 1329-1330, 1335-1336, 1340-1343, 1348-1349, 1356.) Moreover, the trial court found that Juror No. 6 "was dishonest," and "*was lying in court.*" (RT

1360-1361, italics added.) As such, the trial court's inquiry showed a "demonstrable reality" that Juror No. 6 was biased, and substantial evidence supports the trial court's decision to discharge the juror.

In sum, the California Supreme Court's citation to *Cleveland* requires that this Court carefully analyze the trial court's inquiry into the alleged misconduct. Such an analysis, however, shows the trial court did not abuse its discretion in conducting the inquiry, and that discharge of the biased juror was clearly warranted. As such, this Court should affirm the judgment.

Respectfully submitted,

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[Declaration Of Service Omitted In Printing]

Supreme Court No. ___

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	B137365
Plaintiff and Respondent,	)	NA039425
v.	)	
CARDE KEISHON TAYLOR and TARA S. WILLIAMS,	)	
Defendants and Appellants.	)	

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES COUNTY

Honorable Richard R. Romero

PETITION FOR REVIEW IN THE SUPREME COURT AFTER UNPUBLISHED DECISION OF COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, AFFIRMING THE JUDGMENT OF CONVICTION

(Filed Feb. 25, 2002)

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* * *

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, **TARA S. WILLIAMS,** respectfully requests that this Court review the unpublished decision of Division Three of the Second Appellate District of the Court of Appeal of the State of California in B137365 (NA039425). A copy of the Court's opinion is attached as Exhibit A.

QUESTION PRESENTED FOR REVIEW

This petition is filed because review is necessary to secure uniformity of decision and settle the following important question of law (**Cal. Rules of Ct.,** rule 29, subd. (a)(1)):

Does this Court's recent decision in **People v. Cleveland** (2001) 25 Cal.4th 466 compel the conclusion the court abused its discretion in discharging Juror No. 6, the lone holdout for acquittal who the record conclusively reveals refused to vote "guilty" simply because he believed the People had failed to prove petitioner's guilt beyond a reasonable doubt?

This is petitioner's second "Petition For Review." By an order filed July 11, 2001, this Court granted petitioner's first "Petition For Review" and transferred the case to Division Three of the Second Appellate District "with directions to vacate its opinion and

to reconsider the cause in light of *People v. Cleveland* (2001) 25 Cal.4th 466."

The Court's opinion was filed January 18, 2002. In the single paragraph addressing **Cleveland** (Opinion, p. 17), the Court both mischaracterized petitioner's contentions and failed to consider the applicability of **Cleveland,** which made clear that a juror who, unlike the others, views the evidence adduced and interprets the instructions read in a manner which leads him to conclude that the evidence is insufficient to convict the accused does not thereby commit "misconduct" and cannot legally be discharged.

Cleveland compels the conclusion petitioner was denied her Sixth Amendment right to a unanimous jury when Juror No 6 was discharged after actively participating in deliberations during which he "probably ten or fifteen times" said that he did not believe "that there's sufficient evidence" for conviction. Her conviction should accordingly have been reversed. This Court should grant review and so decide.

I

THE COURT CLEARLY ABUSED ITS DISCRETION IN DISCHARGING THE LONE HOLD-OUT JUROR BECAUSE ALL THE FACTS AND CIRCUMSTANCES REVEALED BOTH THAT THERE WAS NO "SUBSTANTIAL EVIDENCE" ESTABLISHING "ACTUAL BIAS" AND HIS INABILITY TO PERFORM HIS DUTIES AS A "DEMONSTRABLE REALITY" BECAUSE HIS VOTE WAS SIMPLY THE RESULT OF HIS BELIEF THE PEOPLE FAILED TO PROVE GUILT BEYOND A REASONABLE DOUBT

Over petitioner's objections that the court could not inquire further after initial inquiry revealed no misconduct was committed and nothing elicited during the initial and subsequent inquiries demonstrated he was unable or unwilling to perform his duties as a juror,[1] the court discharged Juror No. 6,

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[1] On the second afternoon of deliberations, the court received two note from the jury. One stated there was one juror who "has expressed an intention to disregard the law (instruction 6.10.5)" and "has expressed concern relative to the severity of the charge." The other asked "is it legally permissible for a juror to interpret page 32 of the jury instructions [CALJIC No. 6.10.5] to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future?" (CT 207-208; RT 1246-1247.) Inquiry of the foreperson revealed Juror No. 6 never expressed concern about punishment and it was "probably ten or fifteen times" that he "expressed that he doesn't believe that there's sufficient evidence." (RT 1251.) Inquiry accordingly ended and deliberations resumed. The next day, the People filed a "Motion To Question Juror For Bias" citing only the jury's notes from the

(Continued on following page)

the lone holdout for acquittal who refused to vote "guilty" simply because he believed the People failed to prove petitioner's guilt beyond a reasonable doubt. The question presented here is whether **People v. Cleveland** (2001) 25 Cal.4th 466 reveals the court

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previous day. (CT 205.) The court concluded "further inquiry is warranted on whether the jurors concern of the severity of the offense is just another way of saying they are considering punishment." (RT 1262.) On this occasion, the foreperson expressed his "belief" that punishment "is part of the issue in this other juror's mind that ties to the severity of the charge," explaining "[h]e's expressed to us, in effect, that first degree murder is a severe charge and that that has an influence on the way he interprets the evidence and the standard he uses for doubt." (RT 1266.) In response to the court's question "[i]s he using in his mind, then, a higher standard of proof than beyond a reasonable doubt," the foreperson also stated it was "my opinion, not the consensus opinion," that this juror was "using an extraordinary standard, which is beyond reason." (RT 1267-1268.) Regardless, the foreperson confirmed that Juror No. 6 **was not unwilling to follow the law** since the court's answer to the question "eliminated that aspect." (RT 1268.) More particularly, he clearly stated there was "**no explicit statement on his part** that would support that" and it was only his "feeling" or "leading hypothesis" when the prosecutor asked "do you think that based upon your feeling that he's considering the severity of the charge, that because of the severity of the charge, he's unwilling to follow the instruction regarding the standard of proof." (RT 1268-1269; emphasis added.) The foreperson also noted Juror No. 6 had repeatedly attempted to explain to the other jurors the basis for his reasonable doubt and other jurors had tried to persuade him that "his current view is incorrect." (RT 1271-1272.) More importantly, in response to the prosecutor's question whether Juror No. 6 was attempting to justify his reasonable doubt based upon a higher standard of proof, the foreperson unequivocally answered "[n]o." (RT 1273.)

abused its discretion in discharging this holdout juror.

Cleveland

On the second day of deliberations, the jury sent the court a note stating:

> "[w]e request an alternate to replace one juror. One juror does not agree with the charge and does not show a willingness to apply the law. One juror will not abide by the facts and apply the law. Please provide direction in this matter."

(**Cleveland, supra**, 25 Cal.4th at p. 470.) The foreperson explained this juror:

> "could not even agree that a crime had been committed. It was no fault, no foul, and we are having a hard time attempting to have this person even, quote, unquote, apply the law in the five steps where it is outlined in the documents that you gave us to read where it goes to the five points of what is attempted robbery."

(Ibid.) The foreperson added this juror:

> " . . . doesn't feel that there is a valid charge. That *he cannot in all fairness and conscience state that there was* any *evidence to support that* the defendant allegedly came in an was attempting to get the weapon that allegedly

> was behind the counter underneath the cash register."

(**Ibid.**; emphasis added.)

When the court asked the foreperson whether this juror had "made up his mind prior to deliberations and was refusing to discuss the case," the foreperson replied "I don't know if I could say that their [sic] mind was made up before we went into the room" and explained when other jurors asked this juror to discuss his position he responded:

> "[y]ou're not going to sway my mind, this is what I feel in conscience in looking at the big picture, no fault no foul, there's pushing and shoving on every football filed, and the conversation goes from that point. [¶] Does not want to discuss the five points of the law as to attempted robbery . . . "

(**Cleveland, supra**, 25 Cal.4th at pp. 470-471.) The foreperson added this juror stated "*I cannot in conscience look at the evidence rendered* and state that the person was really after the gun." (**Id.**, at p. 471; emphasis added.) When asked whether this juror listened to the other jurors, the foreperson answered "[h]alfheartedly and then interrupts." (**Ibid.**)

The foreperson and nine other jurors raised their hands when the court thereafter asked the jury whether any juror felt another was not deliberating. The court individually questioned the nine jurors, who stated:

– the elements of the offense "do not seem to matter to this juror and he would discuss "elements . . . that had nothing to do with the facts of the case at hand"

– the others "didn't get anywhere" with this juror because he "had an interpretation, and the rest of us have a different interpretation"

– this juror "isn't applying the law" and "[i]t's strictly his own personal opinion"

– regarding questions by the others about the elements of the crime this juror "responds, 'I cannot answer with a yes or no,' and goes into a really big synopsis of what he speculates" and "concludes with his own opinion and is clearly not taking the law into consideration"

– this juror was "not even acknowledging that the defendant was trying to get a gun"

– this juror "has absolutely no interest in the law, your instructions, what we are supposed to consider, and is making judgments and speculations based on his personal feelings"

– this juror stated "we shouldn't even be here, this should not have even come to court, this is a minor incident which any of us could have done"

– this juror "talks and talks and talks about everything except what we are supposed to be dealing with"

– this juror "won't answer questions" and "[w]e are allowing him a chance to talk, and

he talks about 15 minutes, and he even brings up things like police cars and reminded him of Rodney King and all that stuff, and I told him that had nothing to do with this"

– in response to others asking him a "particular question," this juror would say "I've said all I want to say, I won't answer no questions"

– this juror "is not following the instructions" and "contradicts everything that we say, and he . . . doesn't want to go by the rules of the court and the laws"

– this juror was "disregarding the facts altogether" and "won't answer the questions" and "goes off on a tangent or something else every time"

– this juror appeared to be "disregarding the evidence . . . for some unknown reason" and would not participate in the discussion of the elements of the crime

– this juror "doesn't even seem to take [the elements of the crime] into consideration" and "he had his own agenda, and he doesn't seem to take those into consideration, so you can't even discuss it"

– this juror "keeps referring to he has to vote his own conscience"

– this juror would state "this is my opinion and you have a right to your own opinion."

(**Cleveland, supra**, 25 Cal.4th at pp. 471-473.)

The court next questioned this juror. In response to whether he was participating in deliberations, this juror answered:

> "Yes, I certainly think I do, been participating in it for about a day, roughly. I have listened to other people, and they have listened to me. I have asked them to please be a little quiet. *I present the whole case as I see it in its totality. I didn't want to go into the details of the case and mislead each other by arguing about various little things the way each juror sees it. I tend to present my views of the whole picture, and if the other jurors, of course, don't like that view, the I just have to go with my own conscience.*"

(**Cleveland, supra**, 25 Cal.4th at p. 473; emphasis added.) He added "I have no problem with the law" but "I have only *problems with the facts as I perceive them.*" (**Ibid.**; emphasis added)

The court thereafter dismissed this juror over defendant's objection. The court reasoned:

> "I do find that he is not functionally deliberating with the other jurors, that they would ask him specific questions as to the elements and facts, and he refused to respond, and you can't have a meaningful discussion unless you discuss what the particular facts and elements are. It doesn't do any good to talk in generalities as he does want to, so he is excused."

(**Cleveland, supra**, 25 Cal.4th at p. 473.) Division Seven of the Second Appellate District reversed, holding the trial court "violated appellant's right to a unanimous jury by dismissing a 'holdout' juror and failing to develop a record showing beyond a 'doubt' and by a 'demonstrable reality' the dismissed juror's failure to deliberate and prejudging the evidence." (**Id.**, at pp. 473-474.)

This Court first noted that many of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes "apply even more strongly when such inquiries are conducted during deliberations" because jurors may be "particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny" and "[t]he very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (**Cleveland, supra**, 25 Cal.4th at p. 476.)

After reviewing relevant state and federal cases, including **United States** v. **Brown** (D.C. Cir. 1987) 823 F.2d 591, **United States** v. **Thomas** (2d Cir. 1997) 116 F.3d 606 and **United States** v. **Symington** (9th Cir. 1999) 195 F.3d 1080), this Court stated "[w]e agree with the observations in **Brown, Thomas** and **Symington** that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence." (**Id.**, at p. 483.) **Cleveland** then made clear that:

" . . . the numerous decisions discussed above nonetheless support our conclusion that *a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible,* to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. *The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations.* Additionally, *the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper grounds for discharge exists.* We also observe that *permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted.*"

(**Id.**, at p. 485; emphasis added.)

Cleveland thereafter concluded:

" . . . proper grounds for removing a deliberating juror include refusal to deliberate. A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in the discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider

> other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. *The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not grounds for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate simply because the juror expresses the belief that further discussion will not alter his or her view."*

(**Cleveland, supra**, 25 Cal.4th at p. 485; emphasis added.) Applying these principles, the Court found the trial court abused its discretion in discharging this juror because, notwithstanding the jury's initial note, "it became apparent under questioning that *the juror simply viewed the evidence differently* from the way the rest of the jury viewed it" and "individual questioning of the jurors revealed that *it was the conclusion arrived at by Juror No. 1 that was at issue.*" (**Id.**, at pp. 485-486; emphasis added.)

This Court then concluded:

> "It is possible that Juror No. 1 employed faulty logic and reached an 'incorrect' result,

> but it cannot properly be said that he refused to deliberate. Juror No. 1 participated in deliber-ations, attempting to explain, however, inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even if less than sympathetically, to the contrary views of his fellow jurors."

(**Cleveland, supra**, 25 Cal.4th at p. 486.) It was under these circumstances that the Court found the trial court abused its discretion in discharging the juror and reversal was accordingly required.

Analysis

Numerous express and unequivocal statements in **Cleveland** make clear the discharge of Juror No. 6 was an abuse of discretion and petitioner's conviction must necessarily be reversed.

First, **Cleveland** states "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (**Cleveland, supra**, at p. 485.) The scope of inquiry here, however, was anything but limited. Rather, the court twice questioned the foreperson, Juror No. 6 and all the other jurors notwithstanding that initial inquiry of the foreperson in response to the jury's note revealed Juror No. 6 *never* expressed concern about punishment (the purported act of misconduct), did not disagree with the law but instead he had a legitimate question about one jury

instruction which the court had answered and "probably ten or fifteen times" during deliberations said that he did not believe "that there's sufficient evidence" for conviction (RT 1251.)

Second, **Cleveland** states "the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper grounds for discharge exists." (**Cleveland, supra**, at p. 485.) Here, the court granted the People's subsequently-filed "Motion To Question Juror For Bias" even though this motion was based solely on the jury's note, no additional information was brought to the court's attention through the motion, the motion simply made assertions and allegations the foreperson's responses from the previous day had shown were totally unfounded and the foreperson had clearly stated "probably ten or fifteen times" Juror No. 6 "expressed that he doesn't believe that there's sufficient evidence." As such, the matter necessarily should have ended after the foreperson's initial questioning.

Third, **Cleveland** states "[t]he inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (**Cleveland, supra**, at p. 485.) Here, the focus was not on the "conduct" of deliberations. Nor was it simply on the "content" of deliberations. Rather, it was on the other jurors' "beliefs," "opinions," "feelings" and "hypotheses" in a case where they all conceded Juror No. 6 never stated

he was unwilling to follow the law, never stated he was applying a standard of proof different or higher than beyond a reasonable doubt, never stated he was engaging or would engage in juror nullification and repeatedly stated – "probably ten or fifteen times" – that he did not believe there was sufficient evidence to justify a conviction.

Fourth, **Cleveland** states "[t]he circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge," "the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not grounds for discharge" and "[a] juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate simply because the juror expresses the belief that further discussion will not alter his or her view." (**Cleveland, supra**, 25 Cal.4th at p. 485.) Here, the foreperson conceded Juror No. 6 repeatedly attempted to explain to the other jurors the basis for his reasonable doubt and other jurors had tried to persuade him that "his current view is incorrect." (RT 1271-1272.) Accordingly clear is Juror No. 6 was actively participating in deliberations and the concern of the other jurors was simply and exclusively that his conclusion was contrary to theirs.

Fifth, **Cleveland** states "permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted." (**Cleveland, supra**, at p. 485.) Here, although there was no extraordinary reason to allow them to do so, the court allowed the prosecutor and defense counsel to question the jurors.

Conclusion

Cleveland has made clear that a juror who, unlike the others, views the evidence adduced and interprets the instructions read in a manner which leads him to conclude the evidence is insufficient to convict the accused does not thereby commit "misconduct" and cannot legally be discharged. Petitioner was accordingly denied her Sixth Amendment right to a unanimous jury when Juror No 6 was discharged after actively participating in deliberations during which he "probably ten or fifteen times" said that he did not believe "that there's sufficient evidence" for conviction. Her conviction should have been reversed.

CONCLUSION

This Court should grant review and find petitioner's conviction should have been reversed because she was denied her Sixth Amendment right to a unanimous jury when the court removed the lone

juror holding out for acquittal 6 without substantial evidence of the requisite "good cause."

DATED:
February 21, 2002

Respectfully submitted,

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[Exhibit A Omitted In Printing]

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLANT DISTRICT

DIVISION THREE

(Court)

TARA SHENEVA WILLIAMS Petitioner vs. **GWENDOLYN MITCHELL (warden)** Respondent	**PETITION FOR WRIT OF HABEAS CORPUS** (Filed Sept. 26, 2003) No. **B170245** *(To be supplied by the Clerk of the Court)* [X-REF: B137365 3 AID]

* * *

ARGUMENT II.

THE COURT CLEARLY VIOLATED THE JURY'S THOUGHT PROCESS WHICH UNDULY INTERFERED WITH THE DELIBERATIONS AND GRANTED PROSECUTION'S "MOTION TO QUESTION JUROR FOR BIAS".

SUPPORTING FACTS:

First, it is clear the inial inquiring of the foreperson after the court receive the jury's note revealed

juror no.6 committed no misconduct and his concerns were solely exclusively about the insufficentcy of the evidence. The matter accordanly should have ended there, particulary given that the prosecutor express no concern's what so ever that the foreperson's answers revealed misconduct, let alone made no request that the court inquire further. Second, the people's "Motion to question juror for bias" which was *filed the next day* was based soley on the juror's notes, no additional information was brought to the court attention through the motion made assertions **and** allegations which the foreperson's responses had already shown were totally unfounded. The foreperson already told the court there was absolutly nothing about which to inquire further, particulary given the foreperson's unequivocal statement that "probably ten or fifteen times" Juror no. 6 had "expressed that he doesn't believe that there's sufficient evidence". Even so, the inquiry should had focued upon the conduct of the juror's, rather than upon the content of the deliberations. Here the focus was not upon the "conduct" nor "content" of the deliberations. Rather, it was on the other juror's "belief's", "opinion", "feelings", and "hyppothesis" in the case where they all conceeded Juror no.6 never stated he ws unwilling to follow the law, neved stated he was applying a **STANDARD OF PROOF** differrnt or higher than beyond a resonable doubt and neved stated he was engaging or would engage in juror nullification.

SUPPORTING CASES, RULES OR OTHE AUTHORITY

CT 203-208; RT 1246-1356; UNITED STATES V. THOMAS, supra, 116 F. 3d. p. 618, 619 emphasis added; Cleveland, supra, 25 Cal. 4th. p. 476 emphasis added; People v. Jason Lamont Trotter (2002) D.J.D.A.R. 10191 (emphasis added; U.S V. THOMAS (dd Cir. 1997) 116 F. 3d. 606, 622; U.S V. SYMINGTON, Supra, 195 F. 3d. 1080; U.S V. Brown (D. C. Cir. 1987) 823 F2d. 591; Cleveland, supra, 25 Cal 4th. p. 485 emphasis added. People v. Hamilton, supra, 60 Cal. 2d. 105, 126, 128, 138. See Exhibit **B**, P.1, Jason Lamont Trotter See Exhibit **D**, Motion For New Trial, p. 1.

ARGUMENT III.

THE COURT ACTED BIAS TOWARDS JUROR NO.#6 OPPOSE TO THE OTHER JUROU'S IN CLAIMING JUROR NO. #6 WAS DISHONEST

SUPPORTING FACTS:

It is undeniably cleard the court employed a different standard when assesing the credibility of the jurors. When the defense counsel noted Juror #2's answers were contrary to those given by the foreperson and juror #1 and "this highlight the problem we are getting into" in that if juror#2 was being truthful, the fore person and juror #1 necessarily were lying and, if juror#6 was to be excused for dishonesty, "both the foreperson and juror #1 should similarly be excused, as to the other jurors, the court found "(you)

are going to be obviosly get nuances what people hear and understand" and these jurors were simply "recalling events as they remember them". As to juror#6 the found he "is lying

Telling in this regard is the court's statement after juror #3 was questioned by defense counsel: "She's trying to testify as best she can recall to discussions. That would be very difficult for ant of us, even with a photographic memory, to recount exactly what **certain jurors says during vigorous deliberations**. When she says, "in essence, she's doing her best to recall what she hears". When defense counsel asked hoe the court could impose one standard against juror#6 and a completely different standard against the other jurors who "sais emphatically" that juror #6 "never said he wasn't going to follow the law", the court simply found "(t)hese are minor points". Although all jurors were together whenever any statement was made, they were summarily deemed to doing the best they could. When, however, wholly consistent with the tesimony of some of the other juror's, juror#6 testified a particular statment was or was not made, he was lable a liar. It appears to be implicit in the court's "creditbility" determination that it believed the motivation of the other jurors in accusing juror#6 of miconduct was not suspect. The court necessarily abused it's discretion and not evaluating juror #6 in the same manner as it did the others.

SUPPORTING CASES, RULES, OR OTHER AUTHORITY

RT 1307-1308; 1308-1309; 1317 emphasis added; Hightower, supra, 77 Cal. App.4th. p. 1149-1150 emphasis added;

ARGUMENT IV

THE COURT CLAIMED JUOR#6 WAS BIAS TOWARDS THE PROSECUTION

SUPPORTING FACTS:

The foreperson conceded juror #6 repeatedly attempted to explain to the other juror the basis for his reasonable doubt and other juror had tried to persued him that "his current view is incorrect." Accordingly clear is juror #6 was actively participating in deliberations and the concern of the other juror was simply and exclusively that his conclusion was contrary to theirs. There was substaintial evidence established by the court that juror #6 expressed a fixed conclusion at the begining deliberations, refused to consider other points of view, refuse to speak to other jurors, or attempt to seperate himself from the jury.

To this end, juror #6 could be discharged only if there was substaintial evidence of his unwilling to perform his duties as a juror. Here, however juror #6 rightfully and responsibly believe his "this is a very important case and we should be very convienced that if the defendant is found guilty that it is beyond a reasonable doubt" and "it's a good idea to pay

particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we convinced beyond a reasonable and convinced by the evidence that was presented at the trial." Rather than showing fixed immutable "categorical" hostility or preconception, this statement reflected only his keen understanding of both the importance of the task and the standard of proof to be applied.

SUPPORTING CASES, RULES, OR OTHER AUTHORITY:

RT 1271-1272, 1280-1281; Cleveland, supra, 25 Cal.4th pps. 471-473-474 emphasis added; 483, 485-486 emphasis added; People v. Hamilton (1963) – 60 Cal. 2d 105,128, emphasis added; People v. Ray (1996) 13 Cal. 4th 313,344. **See Exhibit C**, People v. Cleveland p. 1 See Exhibit **B**, People v. Trotter, p.1

ARGUMENT V

THE COUTR CLAIMED JUROR #6 WAS BIASED AGAINST THE PROSECUTION BY ADDING HIS OWN WORDS TO THE COURTS INSTRUCTIONS AS TO WHAT THE LAW IS

SUPPORTING FACTS:

The court dismissed juror #6 and indicated, that, "his bias shown in a number of ways, by the fact that he added his own words to the court's instructions as to what the law is. That indicates where his mind is

bent towards and that his biased against the procecution in the matter.

There was no factual basis, let alone "substantial" evidence the court's finding that juror#6 was "s biased juror" against the prosecution because he added his own words to hte court's instructions as to what the law is "and was using an illegal standard to convict" as (h)is standard is very convinced beyond a reasonable doubt". To the contrary, the evidence was that Juror#6 was using the correct legal standard and, in so doing, siply had a view of the sufficiency of the evidence which was not shared by the others. Similary, when the court asked juror#6 to explain what he meant by "very convinced" Juror#6 answered "it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial, "adding" I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt "because it's the same thing".

SUPPORTING CASES,
RULES, OR OTHER AUTHORITY:

RT 1281, 1277-1279; Cleveland, Supra, 25 Cal. 4th. 485-486 See Exhibit **C** emphasis added. People v. Cleveland, p.1

ARGUMENT VI

THE COURT CLAIMED JUROR #6 WAS DISHONEST TO THE COURT IN STATING THAT NO JUROR INCLUDIND HIMSELF HAD DISCUSSED THE SERVERITY OF THE CHARGED, HAD NOT DISCUSSED JUROR NULLIFICATION AND THERE FORE DISCHARGED JUROR #6

SUPPORTING FACTS:

Specifically regarding the purported dishonesty of juror #6, after questioning the foreperson, Juror#6 and juror #1, the court specifically found juror #6 was dishonest to me in stating that no juror, including himself, had discussed the subject of juror nullification" and "he was dishonest when he stated that no juror, including himself, had dicussed the topic of the seriousness of the charge or the case". Clearly, however, there was no evidence, "substantial" or otherwise, that juror #6 "was dishonest" precisely because **no such questions were asked by the court**. Moreover, to the extent the court asked juror#6 "have you made refrence during deliberations to the severity of the case/the serverity of the charge".

Juror#6 did not denied making the statement and was truthful in his reply. This was not "dishonest". As you can see Juror#6 neved reply to the court "the burden of proof he was relying on was a very, very, convinced beyond a reasonable doubt."

SUPPORTING CASES, RULES, OR OTHER AUTHORITY:

RT 1280-1281, 1287, 1360 emphasis added; People V. Hamilton, supra, 60 Cal. 2d. 128; Perez V. Marshall (9th. Cir. 1997) 119 F. 3d. 1422, 1426-1428; U.S V. Brown, Supra, 823 F. 2d. p. 597.

ARGUMENT VII.

THE COURT DISCHARGED JUROR #6, CLAIMING HE DISCUSSED THE SERERITY OF THE CHARGED IN CONJUNTION WITH HIS BRINGING UP THE SUBJECT OF JUROR NULLIFICATION

SUPPORTING FACTS:

The court stated "His bringing up the severity of the charge in conjunction with his bringing up the subject of juror nullification establishes his state of mind that he's bent in that regard, that he's concerned about the severity of the charge, which means the severity of the punishment. They really interchangeable in this context." The court was patently incorrect in concluding "(I)f you focus on the seriousness of the offense, **an inference can be drawn** that the juror is requiring more than proof beyond a reasonable doubt" because that inference was not logical on the facts before the court and wholly speculative. **Rather**, as defense counsel noted, the reasonable inference regarding this or any other juror's concern about the seriousness or severity of the offense was instead that the juror was "going to be extremely sure

that there is proof beyond a reasonable doubt" **precisely because** the offense was seious or severe. Regarding "severity" and "nullification", all the other jurors similarly conceded juror #6 never made an explicit statement regarding either topic. To another juror's question on the second day of deliberations after repeatedly explaining why he believed the evidence was insufficient to convict, Juror #6's statement was a mere reference, stateing his belief nullification was in fact improper and no affirmative evidence whatsoever from any of the other jurors that juror #6 intended to nullify the verdict.

SUPPORTING CASES, RULES, OR OTHER AUTHORITY:

RT 1276 emphasis added, RT 1280, 1298; People v. Osband (1996); People v. Williams (S066106); People v. Hamilton, supra, 60 Cal. 2d p. 128 emphasis added; Thomas, supra, 116 F. 3d p. 612 emphasis added; Thomas v. Clark (2000 W L 335611, *3 (N.D. CAL.) abd cases cited therein); People v. Jason Lamont Trotter (2002 D.J.D.A.R.); People v. Cleveland, supra, 25 Cal 4th p. 485; People v. Ceveland (2001) 25 Cal. 4th 466. See Exhibit **C**, People v. Cleveland,p.1

ARGUMENT VIII.

THE COURT ERRED IN DISCHARGING THE LONE HOLDOUT JUROR WITHOUT GOOD CAUSE. THIS ERROR WAS PREJUDICIAL AND REQUIRES A REVERSAL.

SUPPORTING FACTS:

The court abused it's discrtion in discharging juror #6, the lone holdout for aquittal who committed no serious and willful misconduct consituting good cause to conclude he was unable to perform his functions as a juror as a demonstratable reality and instead refused to vote guilty because he believed the people failed to prove defendant's guilt beyond a reasonable doubt. The court violated defendant's Sixth Amendment Rights by discharging a deliberating juror whom it believed was engaged in jury nullification amongst other misconduct. In doing so, the court stated: "I'm going to dismiss the juror, but **not because he's not deliberating and not because he's not following the law. I think it's somewhat questionable whether he is deliberating or not**. One juror saidarently he was dooling alot and had his back to the board, but he did respond to questions when pushed and did present at least to the other jurors an intelligible reason for his position. But it's fairly debatable whether he was deliberating or not, so I'm not taking that into account. That is not basis for dismissal. Not following the law is not a basis for his dismissal either, since there was a request by him to have the law clarified for him. He is dismissed without any question in my mind as a biased juro.

His bias is shown in a number of ways, by the fact that he added his own words to the court's instructions as to what the law is. That indicates where his mind is bend towards and that is biased against the prosecution in the matter. His **repeating of the severity of the charge in conjunction with his bringing up the subect of juror nullification establishes his state of mind that he's bent in that regard**, that he's concerned about the severity of the punishment. They really are interchangable in this context. When he talks about evidence and the severity of the charge and burden of proof. When I asked him what burden of proof he was relying on, **he said it was a very, very convinced beyond a reasonable doubt**. Clearly from the evidence presented here that it's higher than beyond a reasonable doubt because the charge is murder. He also **disagrees with the feony murder rule**. That's clear from the juror's response. **He's dishonest to me** in stating that no juror including himself had discussed the severity of the charge, had not discussed juror nullification. Some juro's didn't heat that. We're not talking about him hearing another juror discus those issues, it's whether he discussed those issues, and he was **dishonest in court**. And again, I don't like to do this, but, **"in my opinion, he was lying in court"**. **"He has no business being a juror in this matter, and he is dismissed".**

SUPPORTING CASES, RULES, OR OTHER AUTHORITY:

RT 1359-1361 emphasis added; **Jury Key 97(4)**; California Rules of Court – Rule 1, subd. (a)(3); People v. Jason Lamont Trotter (D.J D.A.R. 10191): Ceveland, supra, 25 Cal. 4th. p. 473-474, 485-486 emphasis added; People v. Ceveland (2001) 25 Cal. 4th. 466; UNITED STATES V. BROWN, supra, 823 F. 2d. p. 597; People v. delamore (1996) 48 Cal. App. 4th. 1850, 1856: UNITED STATES V. BROWN (D.C Cir.1987) 823 F. 2d. 591; UNITED STATES V. THOMAS (2d. Cir. 1987) 823 F. 3d. 606; UNITED STATES V. THOMAS, SUPRA, 116 F. 3d. 606; United States V. Symington (9th Cir. 1999) 195 F. 3d. 1080: United States V. Thomas supra, 116 F. 3d. p. 619; Hightower, supra, 77 Cal. App. 4th. P. 1147-1150 emphasis added; People v. Daniels (1991) 52 Cal. 3d. 815, 863; Peple v. Roberts (1992) 2 Cal. 4th 271, 325; People v. Kaurish (1990) 52 Cal. 3d. 648, 694; People v. Ray (1996) 13 Cal. 4th. 313, 344; People V. Williams (1997) 16 Cal. 4th. 153, 232; People v. Goldberg (1984) 161 Cal. App. 3d 170, 192; People v. Osband (1996) 13 Cal. 4th. 622, 675; People v. Hamilton, supra, 60 Cal. 2d. p. 128; Perez v. Marshall (9th Cir. 1997) 119 F. 3d. 1422, 1426-1428; People. v. Rodriguez (S073219) (65 Cal. App. 4th. 1156). See Exhibit **D**, Motion for new Trial p.1, See Exhibit **C**, People v. Cleveland, p.1

ARGUMENT IX.

THE COURT FOUND THAT JUROR #6 DIAGREED WITH THE FELONY MURDER. THEREFORE JUROR #6 WAS UNDULY DISMISSED. A NEW TRIAL SHOULD BE GRANTED.

SUPPORTING FACTS:

On the second afternoon of deliberations, the court received two notes from the jury. One stated there was one juror who "has expressed an intention to disregard the law (instuction 6.10.5)" and "has expressed concern related to the severity of the charge". The other note asked "is it legally permissble for a juror to interpret page 32 of the jury instuctions (CALJIC NO. 6.10.5) to mean that the conspiracy should involve a plan to commit robberies in the future?" Regarding the question, the court concluded "I believe the appropriate answer is succint and simple, '**NO**', "because" an agreement as to the specific physical target of the robbery "was" just not a requirement of the law.

Further inquiry by the court, to the juror's regarding this question among others revealed that, juror#6 neve stated he was unwilling to follow the law and that it was only some of the jurors **"beliefs", "thoughts", and "opinions"** that juror #6 would not follow the law. The foreperson also confirmed that juror#6 **was not unwilling to follow the law** since the court's answer to the question "eliminated that aspect". In response to the prosecutor's question whether anyone had "indicated an unwillingness to follow the

law," Juror #1 answered, "**I think** there is a juror who doesn't understands the law". Again the court had no substantial evidence to find juror #6 disagreed with the felony murder rule.

SUPPORTING CASES, RULES, OR OTHER AUTHORITY:

CT 207-208; RT 1246-1247, 1268, 1290 emphasis added, 1319, 1321, 1329, 1334, 1342, 1347, 1353, 1354, 1359-1361 emphasis added; People v. Hightower (2000) 77 Cal. App. 4th. 1123, 1147; RT 1253 emphasis added. See Exibit **D**, Motion For New Trial, p.1

* * *

PETITIONER'S BRIEF

RECORD AND BRIEF

No. 11-465

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS FOR PETITIONER

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QUESTION PRESENTED

Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.

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OPINIONS BELOW

The opinion of the Ninth Circuit (Petition Appendix (PA) 1a-53a) is reported at 646 F.3d 626. The district court's order (PA 57a-58a) and the magistrate judge's report and recommendation (PA 59a-78a) are unreported. The opinion of the California Court of Appeal (PA 87a-118a) is unpublished.

JURISDICTION

The petition for writ of certiorari was filed on October 10, 2011, and was granted on January 13, 2012. The jurisdiction of this Court rests on 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The State Court Trial

1. In 1999, respondent Tara Williams and codefendant Carde Taylor were charged with the 1993 robbery-murder of Hung Mun Kim. At Williams's separate trial, the State produced evidence that Taylor had shot and killed Kim during a liquor store robbery; that Williams had told police she had driven Taylor and another accomplice to Kim's liquor store and then had driven them away after the fatal shooting; and that Williams had been the getaway driver in a prior robbery committed with Taylor. See PA 88a-90a.

2. During jury deliberations at Williams's trial, the judge received a jury note saying that one of the jurors had "expressed an intention to disregard the law" and had "expressed concern relative to the

severity of the charge" of first degree murder. Reporter's Transcript, Los Angeles County Superior Court case no. NA039425, U.S. District Court docket no. 71, lodgment 14 (RT) 1246. Outside the presence of the other jurors, the judge briefly questioned the jury foreperson (Juror No. 8) about the note. RT 1250-52. Asked if the particular juror had committed misconduct by considering punishment or having a family member in a similar situation, the foreperson answered, "it's halfway to that"; but the foreperson believed that the judge's clarification of a jury instruction (in response to another jury note) "may be sufficient to resolve [the] concern at this time." RT 1252. The jury resumed its deliberations. RT 1252.

The next day, the prosecutor requested additional questioning of the jurors and the discharge of Juror No. 6 for bias. RT 1257-62; Clerk's Transcript, Los Angeles County Superior Court case no. NA039425, U.S. District Court docket no. 71, lodgment 13 (CT) 203-06. Williams's defense counsel, relying on *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999), objected that further inquiry and removal of Juror No. 6 would violate Williams's "right to a fair trial and a unanimous jury under the Sixth Amendment to the United States Constitution and under the California Constitution." RT 1264. The judge allowed further inquiry. RT 1265.

a. Upon further questioning, the jury foreperson said that "currently" there was a "fairly clear statement on [Juror No. 6's] part that connects the severity of the charge with—explicitly of first degree

murder with his need for a higher standard [of proof]." RT 1271, 1273, 1278; see PA 97a-98a. While initially having reported that Juror No. 6 expressed his belief that there was insufficient evidence, RT 1251, the foreperson explained that the charge's severity influenced Juror No. 6's interpretation of the evidence and his use of an "extraordinary standard" of "beyond reason," RT 1267-68.

b. The judge expressed concern that Juror No. 6 was employing an illegal standard of proof by linking it to the severity of the charged offense. RT 1274, 1276-77. During the examination that followed, Juror No. 6 denied using a higher burden of proof for the first degree murder charge, and denied that "anyone" had discussed the severity of the charge. But, then, when asked if *he* had referred to the severity of the charge, Juror No. 6 "amend[ed]" his answer, admitting that he had said "this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." He asserted that convinced "beyond a reasonable doubt" and "very convinced beyond a reasonable doubt" were the same. And, although agreeing that jurors should not use nullification, Juror No. 6 admitted that, in response to another juror "rais[ing] the question of whether juries always convict according to the law," he had answered that "sometimes they don't." RT 1278-82; see PA 98a-99a.

The judge said he believed that Juror No. 6 had engaged in misconduct in that he was "applying a higher burden of proof than the law requires," and

that, although Juror No. 6 "isn't lying," he had "intentionally withheld honest information." The judge, however, undertook inquiry of the remaining jurors to develop a "fuller record." RT 1289; see PA 99a-102a.

c. In that inquiry, most of the jurors stated that the juror had expressed an unwillingness to follow the law. RT 1303-04 (Juror No. 2), 1309 (Juror No. 3), 1321 (Juror No. 5), 1329-30 (Juror No. 7),[1] 1342-43 (Juror No. 10), 1347, 1350 (Juror No. 11), 1354 (Juror No. 12). Two of those jurors further reported that the juror had added, or felt he could add, words to the court's instructions to reflect what he thought the law should be. RT 1312-13, 1315 (Juror No. 3), 1342-43 (Juror No. 10). Another juror (No. 9) indicated that the juror did not agree "with what the law said that [had been] read" to the jury and "didn't like [the law]." RT 1334.

Four jurors asserted that the juror had been using a burden of proof higher than reasonable doubt. RT 1316 (Juror No. 3), 1325 (Juror No. 5), 1347 (Juror No. 11), 1354, 1356 (Juror No. 12). Two of these jurors explained that the juror had expressed a need for proof beyond all doubt or "no doubt" and was requiring "[a]bsolute proof." RT 1347 (Juror No. 11), 1354, 1356 (Juror No. 12). Another juror (No. 10) said that the juror's "own beliefs" had been his "standard of proof" and that his arguments had been based on a

---

[1] The Reporter's Transcript misidentifies Juror No. 7 as "Juror No. 6."

disagreement with the law and what he thought the law should say. RT 1344.

Many jurors reported that the juror disagreed with California's vicarious-liability and felony-murder rules. Juror No. 2, in explaining how Juror No. 6 had expressed an unwillingness to follow the law, reported that the juror could not accept that, even though Williams was not the shooter, she nevertheless faced the same "penalty" as the codefendant who shot the gun. RT 1303; see RT 1305-06. Juror No. 5 said that the juror felt "you can't charge somebody for something they didn't do if they weren't there at the time because" he "d[id]n't think the burglary or robbery and . . . a first degree murder charge can be tied together in one sentence." RT 1324. Juror No. 5 also reported that the juror had discussed penalty, RT 1321-23, and expressed an unwillingness to follow the law by saying, "'There's no way that I could . . . come to a decision with that kind of penalty for that kind of charge[,]' " RT 1322. Juror No. 10 reported that the juror did not believe that "the evidence showed that first degree murder should be the *charge*." RT 1346 (emphasis added). And, according to Juror No. 11, the murder charge "kept coming into play" for the juror, "even when we were trying to discuss just the robbery." RT 1352.

Regarding "nullification," Juror No. 7 said that one unidentified juror had mentioned "jurors not following the law or juror nullification"; and that, although the juror had not "sa[id] he was going to refuse to follow the law," he nevertheless had said

that it is "a right of the jurors that if you didn't believe the law, . . . you were able to hang the jury." RT 1329-30. Two jurors reported that the juror had started the juror-nullification discussion, although they also said that the juror had not expressed an intent to nullify. RT 1294 (Juror No. 1), 1348 (Juror No. 11). Still, Juror No. 11 said that the juror had discussed jurors "vot[ing] against" the law "in particular cases if they didn't agree with the law," and that the juror felt that "the charge of murder was too strong in this case." RT 1347-49. Two other jurors reported that the juror, when asked if he had a "social" or "political agenda," had responded by mentioning past trials in American history. RT 1326-27 (Juror No. 5), 1346 (Juror No. 10).

d. On the other hand, Juror No. 9 and Juror No. 12 opined that the juror simply interpreted the law differently than the other jurors. RT 1335-39, 1354-55. Juror No. 4 agreed. RT 1319. And, when asked by defense counsel if there had been an "honest difference of opinion" between Juror No. 6 and the other jurors, Juror No. 1 answered, "Yes," and Juror No. 2 answered, "Well, I guess [Juror No. 6 is] being honest." RT 1291-92, 1302, 1305. Juror No. 9 said, further, that there had been no discussion of "historical juries." RT 1335. Similarly, in Juror No. 1's account, Juror No. 6 never said that he was applying a burden of proof higher than "beyond a reasonable doubt" because of the charge's severity. RT 1293. And Juror No. 12 did not "feel" that the charge's severity had entered into the juror's deliberation. RT 1354.

e. During the hearing, Williams's counsel told the trial judge that, even if Juror No. 6 had a "faulty understanding of what reasonable doubt was," the remedy would be to reinstruct the jury or declare a mistrial. He argued that the Ninth Circuit's *Symington* test—which he described as a "constitutional standard" that prohibited the dismissal of a juror if "there is any reasonable possibility that this issue is really about the merits"—prohibited dismissing Juror No. 6 because it "deprive[d] the defendant of the right to a unanimous jury." RT 1300.

The judge responded that *Symington* had involved the issue of "meaningful deliberations" whereas "the issue is whether you have a biased juror here who is dishonest, not only during voir dire, but right before the Court, and therefore, if he is dishonest, and so far it seems to me that he is, then he can't be trusted when he says he's going to follow the Court's instructions as to what is a conspiracy and what is the appropriate burden of proof." RT 1300-01. The judge added: "Not to be blunt about it, but a person would say that [Juror No. 6] is a liar and doesn't belong on the jury." He concluded that, "without any question, beyond any possible reasonable doubt that [Juror No. 6] was dishonest to us right here." RT 1301.

After all the jurors were examined, the judge dismissed Juror No. 6 for being "biased." RT 1359. The judge explained that Juror No. 6: (1) "had added his own words to the court's instructions as to what the law is[,]" which indicated that he was "biased

against the prosecution"; (2) had repeatedly referred to the severity of the charge in conjunction with bringing up juror nullification, indicating that he was improperly concerned about the severity of punishment; (3) had been employing a burden of proof higher than that of "beyond a reasonable doubt"; (4) disagreed with the felony-murder rule; and (5) had been dishonest in stating that no juror had discussed the severity of the charge or juror nullification. The judge concluded, "in my opinion, [Juror No. 6] was lying in court. He has no business being a juror in this matter, and he is dismissed." RT 1359-61; see PA 102a-103a.

Juror No. 6 was replaced. RT 1362. The jury began deliberations anew, and convicted Williams the following afternoon. RT 1362-69.

3. Williams filed a motion for new trial. CT 297-301. As one of her grounds, and relying in part on *Symington*, she claimed that her "right to a fair trial and due process, as well as her right to a unanimous jury, were violated when the court granted the prosecution's request to remove the juror who was consistently voting for acquittal." CT 300-01. The trial court denied the motion, stating that its prior rulings "were appropriate." RT 1371-72.

B. The State Court Appeal

On direct review in the California Court of Appeal, Williams presented a juror-removal claim under a single argument heading. Joint Appendix (JA) 25-67. She argued that the trial court had abused its

discretion under California Penal Code section 1089, authorizing removal of a juror in a criminal case in the event of illness, death, or other "good cause," because the removal of Juror No. 6 was unsupported by "good cause" in that there had been insufficient evidence of "actual bias." JA 25, 27-28. She argued that the "improper[ ] remov[al]" of Juror No. 6 from a "deadlocked" jury was prejudicial and "accordingly" violated "her Sixth Amendment right to a unanimous jury[.]" JA 29; see JA 67.

The California Court of Appeal, in affirming her conviction, described Williams's claim as the trial court having "erred by discharging one of the jurors during deliberations," and concluded, "This claim is meritless." Opinion, California Court of Appeal case no. B137365, U.S. District Court docket no. 10, lodgment 4 (Cal. Ct. App. Opn. (3/27/01)) 10; see JA 2. The panel explained that "[t]he evidentiary hearing supported a conclusion that Juror No. 6 was biased." Cal. Ct. App. Opn. (3/27/01) 13. It concluded that the trial court had "not abuse[d] its discretion in removing Juror No. 6." *Id.* at 17.

The California Supreme Court granted review of the case, and remanded it back to the Court of Appeal for reconsideration under the state supreme court's then-recent decision in *People* v. *Cleveland*, 25 Cal. 4th 466, 21 P.3d 1225 (2001). JA 3. *Cleveland* authorized the trial court to remove a juror during deliberations where it appears as a "'demonstrable reality' that the juror is unable or unwilling to deliberate." *Cleveland*, 25 Cal. 4th at 484. In setting out the

"demonstrable reality" standard, *Cleveland* rejected the "any reasonable possibility" test employed in the Second, Ninth, and D.C. Circuits. *Id.* As the state supreme court later explained, the demonstrable-reality test's "heightened standard" of review "reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." *People* v. *Barnwell*, 41 Cal. 4th 1038, 1052, 162 P.3d 536 (2007). But *Cleveland* agreed with the federal circuits that (1) "a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence"; and (2) a court's inquiry must be limited so as not to undermine the sanctity of jury deliberations. *Id.* at 483-85 ("the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts . . . does not constitute a refusal to deliberate and is not a ground for discharge").

On remand, the California Court of Appeal requested supplemental briefing on the effect of *Cleveland*. See JA 3. Williams argued that, under *Cleveland*, the trial court had abused its discretion, JA 109, 118-21, and that she "was accordingly denied her Sixth Amendment right to a unanimous jury when Juror No. 6 was discharged," JA 121.

Again describing Williams as "contend[ing] that the trial court erred by discharging one of the jurors during deliberations," the California Court of Appeal again rejected the claim as "meritless." PA 97a. The state appellate court's written opinion explained

that section 1089 permits a trial court "to discharge a juror who 'upon . . . good cause shown to the court is found to be unable to perform [his or her] duty.'" PA 103a (ellipsis in original). Citing *Cleveland*, the panel explained that a trial court's dismissal decision is reviewed for abuse of discretion, that the trial court's ruling must be supported by substantial evidence, and that the juror's inability or unwillingness to perform must appear on the record as a "demonstrable reality." PA 103a (internal quotation marks omitted).

Given that the trial court's stated reason for discharging Juror No. 6 was that he was a "'biased juror,'" see PA 102a, the state appellate court examined whether the removal of Juror No. 6 for bias was proper. PA 104a-105a. Relying on *People* v. *Nesler*, 16 Cal. 4th 561, 580-81, 941 P.2d 87 (1997), a state supreme court decision that had considered whether the presence of a biased juror violated the defendant's state and federal constitutional rights to an impartial jury and his state constitutional right to a unanimous jury, the court of appeal considered "'[w]hat constitutes "actual bias"'" in terms of *both* "'federal constitutional purposes'" and California state law. PA 104a.

The state appellate court then concluded, "[t]he evidentiary hearing supported the trial court's finding of bias." "According to most of the jurors," the state appellate court observed, "Juror No. 6 had either explicitly said he would not follow the law or he had implied as much." Juror No. 6 "apparently rejected the notion that, because of vicarious liability, Williams and Taylor might be guilty of the same crime." PA

104a. And "[t]he trial court was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest." PA 104a-105a. Rejecting Williams's argument that the trial court had erred under *Cleveland*, the California Court of Appeal accepted the trial judge's explanation that he had discharged Juror No. 6 "because he had shown himself to be biased, not because he was failing to deliberate or engaging in juror nullification." PA 105a (original emphasis omitted).

The California Supreme Court denied further appellate review. PA 85a.

C. The Habeas Corpus Proceedings

1. Williams filed a habeas corpus petition, including the juror-removal claim, in the Los Angeles County Superior Court. That court denied the petition, ruling that the issues raised in the petition were "issues for direct appeal[,] not collateral attack." PA 83a-84a.

2. Williams next initiated federal habeas proceedings. See JA 9. Echoing the language that the California Court of Appeal had used to describe her juror-removal claim, Williams claimed in her amended federal petition that, "[t]he trial court erred in its dismissal of the lone holdout juror." Amended Pet. at 5. She argued that the dismissal of Juror No. 6 violated state and federal law. Amended Pet., Mem. of P. & A. 15-30.

The district court stayed the proceedings to give Williams an opportunity to exhaust any available remedies in state court. See JA 10. Williams filed state habeas petitions in the California Court of Appeal and California Supreme Court, again challenging the removal of Juror No. 6. In the court of appeal, she listed eight separate "Argument[s]" regarding the juror's removal, JA 150-64, including one where she asserted that the trial court "violated [her] Sixth Amendment Rights by discharging a deliberating juror whom it believed was engaged in jury nullification amongst other misconduct," JA 160. In the supreme court, she again separately enumerated her juror-removal arguments. Habeas Pet., Cal. Supreme Ct. case no. S122165, U.S. District Court docket no. 71, lodgment 21 at 5-14. Both courts denied the juror-removal claim because it had been raised and rejected on appeal and thus could not be raised again in a state habeas petition. See PA 15a n.4, 79a, 81a-82a.

3. After federal proceedings resumed, the magistrate judge filed a report recommending that Williams's petition be denied and dismissed with prejudice. PA 59a-78a. The magistrate judge described Williams's juror-removal claim as follows:

> In Ground One [Williams] contends that the trial judge erred when he dismissed juror number six ("Juror 6"). [Williams] argues that it was violative of her rights under state and federal law to discharge the "lone holdout juror" during deliberations.

PA 67a. The magistrate judge noted that the petition was governed by the provisions of AEDPA, and discussed the deferential standard of review accorded to state-court merits adjudications under 28 U.S.C. § 2254(d). PA 65a-67a. Explaining that the trial court's factual finding of bias is entitled to "special deference," the magistrate judge concluded that "the discharge of Juror 6 under the circumstances of this case did not constitute a constitutional violation[,]" and the "record amply supports the trial judge's determination that good cause existed for the discharge of Juror 6." PA 68a, 70a. The district court adopted the report and recommendation and entered judgment dismissing the petition with prejudice. PA 55a, 57a-58a.

D. The Ninth Circuit Appeal

1. The Ninth Circuit Court of Appeals granted a certificate of appealability on the issue of "whether the trial court violated [Williams's] Sixth Amendment right to a fair trial when it dismissed juror number six." See JA 17. The parties argued the juror-removal issue expressly under § 2254(d)'s deferential standard of review. Appellant's Opening Brief, case no. 07-56127, (AOB) 29-30, 44, 57; Appellee's Brief, case no. 07-56127, 8-13; see JA 19-20. In her opening brief, Williams acknowledged that the California Court of Appeal, in its direct appeal opinion, had adjudicated her federal constitutional juror-removal claim. Specifically, she wrote that she had "challenged her conviction, in part on the ground that the trial court had violated her Sixth Amendment right to a fair trial by dismissing the lone holdout juror[,]" and "[t]he

California Court of Appeal rejected [her] claims in a unpublished opinion, finding" that "[t]he evidentiary hearing supported the trial court's finding of bias." AOB 28.

2. In a published opinion authored by Judge Reinhardt, the Ninth Circuit panel reversed the district court. The panel held, first, that the deferential-review standard in § 2254(d) did not apply because the California Court of Appeal had adjudicated "only [Williams's Penal Code] section 1089 claim, but not her constitutional claim." PA 22a. According to the panel, Williams had presented "two arguments" concerning the juror's removal: (1) her Penal Code section 1089 "argu[ment] that the trial court abused the discretion accorded it by that statute to dismiss the jurors for cause"; and (2) "her constitutional claim . . . that the 'remov[al] and replace[ment]' of a holdout juror from 'a jury which had previously been deadlocked' violated her rights under the Sixth Amendment." PA 20a-21a (brackets in original); see PA 21a-23a nn.8 & 9. In the Ninth Circuit panel's view, the California Court of Appeal "did not consider . . . whether the removal of the known holdout juror violated the Sixth Amendment." PA 22a; see PA 22a-23a n.9.

In reaching this conclusion, the panel dismissed the state appellate court's quotation from *Nesler*, which had quoted this Court's opinions in its "discussion of the federal constitutional principle of impartiality." In the panel's estimation, the state court had relied on this Court's precedent only in the

context of discussing the state-law claim. This was insufficient, in the panel's estimation, because "[t]he section 1089 issue was distinct from Williams's constitutional claim: that the removal of Juror No. 6 violated her right to a fair trial." PA 22a-23a n.9.

The Ninth Circuit panel acknowledged that, in this Court's recent decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), a federal habeas court faced with an unexplained state-court decision "must 'presume[ ] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.'" PA 23a (original brackets). But the panel ruled that the merits-adjudication presumption had been "overcome" because the California Court of Appeal had "provided a lengthy, reasoned explanation for its denial of Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly." PA 23a-24a. Because the state court opinion "made no mention whatsoever" of the "constitutional claim," the panel found that this was a "compelling 'indication' that the court either had overlooked or disregarded [Williams's] Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision." PA 24a (emphasis omitted) (citing *Richter*, 131 S. Ct. at 785); see PA 24a-25a.

While the panel acknowledged an exception where the state court in rejecting the claim had relied on a rule that comported with the federal Constitution, it said that the state court of appeal's adjudication of

the Penal Code section 1089 claim did not necessarily entail the adjudication of the constitutional claim because "California [in its *Cleveland* decision] does not appear to have considered . . . how the federal constitution constrains a trial court's discretion to discharge a juror from deliberations[.]" PA 25a-26a. The Ninth Circuit reasoned that the state court of appeal had conducted a "purely statutory analysis of whether the trial court had properly exercised its discretion under section 1089," but had not analyzed whether that statute was constitutional as applied. PA 28a. Thus, the deferential § 2254(d) standard was inapplicable. PA 28a.

Next, conducting *de novo* review of Williams's federal claim, the Ninth Circuit panel concluded that "the Sixth Amendment does not allow a trial judge to discharge a juror on account of his views of the merits of the case." PA 31a-32a. "[I]n deciding whether to discharge a juror mid-deliberation," the panel explained, "the critical Sixth Amendment questions are whether, after an appropriately limited inquiry, it can be said that there is no reasonable possibility that the juror's discharge stems from his views of the merits, and whether the grounds on which the trial court relied are valid and constitutional." PA 34a.

Here, the Ninth Circuit panel found that the trial court's dismissal of Juror No. 6 failed to satisfy those alleged constitutional criteria. PA 30a-52a. First, the panel held that Williams's "Sixth Amendment rights" were violated because, even "presum[ing] all of the facts found by the state court to be correct, 28 U.S.C.

§ 2254(e)(1)," "the record discloses a 'reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case.'" PA 39a (quoting *United States* v. *Symington*, 195 F.3d at 1087); see PA 34a-41a. The panel equated a Sixth Amendment violation with satisfying the *Symington* test—indeed, it referred to the Sixth Amendment violation as the "*Symington* violation." PA 42a.

Second, as a basis for relief "independent" from the so-called "*Symington* violation," the panel determined that the trial court lacked "'good cause' for removing the known holdout juror. . . ." PA 41a-42a. Specifically, it rejected the trial judge's finding of bias—the "good cause" for discharging the juror—by rejecting the "reasons" or "bases" the trial judge had given for that finding. PA 43a-44a. In this regard, the Ninth Circuit found, first, that the fact that "Juror No. 6 disagreed with the felony murder rule, . . . even if it constituted 'bias' under California law, was not 'good cause' for removing a deliberating juror, absent a finding that he was unwilling to follow the law due to his concerns about it." PA 44a. The panel next found that the trial court incorrectly determined that Juror No. 6 "was applying a higher-than-allowed burden of proof" and "clearly misstated what Juror No. 6 had testified to during the court's inquiry." PA 45a-46a. The panel further found that the trial court had incorrectly determined "that Juror No. 6 was concerned with the severity of the punishment, as opposed to the seriousness of the offense charged. . . ." PA 48a (original emphasis omitted). Finally, the panel

found that the trial court wrongly determined that Juror No. 6 was "'lying in court'" based on the trial court's faulty "recollection of statements made in court by the juror," and "this [was] not a case in which a credibility determination was based on intangible factors, such as demeanor. . . ." PA 50a-51a. The panel therefore concluded that the removal of Juror No. 6 "deprived Williams of her right to a fair trial by jury." PA 52a.

3. The State sought rehearing and rehearing en banc. The State argued that § 2254(d) deference should have been applied because the California Court of Appeal had adjudicated Williams's federal juror-removal claim on the merits, and because the panel had failed to afford any deference to the trial court's factual findings. The Ninth Circuit declined to rehear the case. PA 119a.

SUMMARY OF ARGUMENT

To "adjudicate" a claim so as to trigger deferential § 2254(d) review in later federal habeas corpus proceedings, a state court is not required to expressly discuss the federal-law basis of the claim. Rather, when the state court has addressed the alleged error, it has adjudicated the claim. That adjudication is on the merits absent a plain statement to the contrary.

This interpretation is correct for several reasons. It appreciates that state courts do not ignore federal constitutional arguments presented to them when

the validity of the argument might determine the result. State courts have a duty to enforce the federal Constitution and they are presumed to perform their duties. As this Court has repeatedly recognized—and as Congress recognized in AEDPA—the state courts are trusted to take that duty seriously. Indeed, state substantive law often necessarily reflects federal constitutional principles. Accordingly, where the state court's opinion actually grapples with the substance of the alleged error—as it did in this case—it confirms that the state court adjudicated the entirety of the claim, irrespective of the various state-law and federal-constitutional arguments presented.

This realistic approach toward state courts also reflects state courts' opinion-writing practices. Because states such as California permit their state courts to summarize the issues in their decisions, § 2254(d)'s application should not require state courts to separately identify each contention or argument to ensure later deference on federal habeas review. Indeed, permitting state courts to summarize or generalize their description of the issues in a case makes sense because state courts decide *both* state-law and federal-constitutional questions, whereas federal habeas courts reviewing state-court convictions decide *only* federal-constitutional questions. And, given that this Court and the lower federal courts view their own silence as to presented arguments as an implicit rejection of them, federal-state comity counsels that the state courts' opinions be afforded the same treatment.

The State's interpretation—that a state court adjudicates a claim on the merits when it discusses the alleged error on substantive grounds in denying relief—is in harmony with this Court's precedents, which take a realistically broad view of what qualifies as an adjudication on the merits. This Court's "plain statement" cases authorize a conclusive presumption where the most reasonable explanation for a state-court ruling is that the state court decided the case the way it did because federal law required it to do so. In such situations, a federal court must conclude that a state court decided a case on federal-law grounds unless a state court makes a plain statement to the contrary.

The Ninth Circuit's contrary rationale—built upon a presumption of error by the state courts—is unrealistic and disrespectful of state courts. It engaged in an improbable and untoward assumption, based merely on a slight negative inference, that the state court failed to comply with its duty to address a potentially determinative federal claim for relief. Further, the Ninth Circuit's view inappropriately would require state courts to employ particular language to ensure that federal habeas courts will accord their rulings the deference required by § 2254(d). The comity principle reflected in AEDPA, however, militates against any obligation to use such "magic words." Finally, the Ninth Circuit's approach amounted to a "do-it-yourself" circumvention of § 2254(d) deference. A federal habeas court would have been forbidden, by the § 2254(d) deference rule, to rely on only its own

circuit-centric view of the law to grant relief on a habeas corpus claim adjudicated on the merits in state court. Here, however, the Ninth Circuit panel resorted, under the guise of deciding the triggering "adjudication" question, to that same view of its own law to short-circuit § 2254(d) deferential review at the threshold.

The circumstances of this case confirm the wisdom of treating state-court decisions as merits-adjudications of fairly-presented federal claims where the state court addresses the substance of the claimed error and denies relief. Given the integrated manner in which Williams presented her state-law and federal-constitutional arguments regarding the juror's removal, it was natural for the state appellate court to treat the arguments as a single, integrated juror-removal claim. The state court reasonably could have concluded that the "ultimate question for disposition" posed by both arguments was the same—namely, whether the juror was impartial. Also, the state court relied on California substantive law that had its foundation in federal constitutional principles. Further, the state court used general encompassing language in describing and rejecting the claim. And, in any event, the state court later expressly indicated that it earlier had rejected Williams's federal claim in the original appeal.

Because the California Court of Appeal's opinion came to grips with the substance of the claimed erroneous removal of the juror, it adjudicated the entirety of Williams's juror-removal claim on the

merits. Federal habeas review should have been conducted under the highly-deferential standard of § 2254(d).

ARGUMENT

To Adjudicate a Claim on the Merits for Purposes of § 2254(d), a State Court Does Not Need to Expressly Identify the Federal-Law Basis or Nature of the Claim

Where a claim has been "adjudicated on the merits" by a state court, the petitioner must surpass the "'difficult'" and "'highly deferential'" review standard of § 2254(d). *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011); *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 (2010). The question in this case is whether a claim has been "adjudicated on the merits" where the state court issues an explained decision, but does not expressly acknowledge the federal-law nature of the claim.

The answer is yes—at least where the state court addressed the alleged error on substantive grounds in denying relief. It does not matter whether the state court expressly acknowledges or discusses the federal-law basis or nature of the claim.

A. When the state court has addressed the alleged error on substantive grounds, it has adjudicated the entire claim "on the merits" under § 2254(d) absent a plain statement to the contrary

1. In determining whether a state court has adjudicated the merits of a state prisoner's federal claim—or instead has stopped short of it—federal habeas courts must be mindful of the state courts' duty to enforce the federal Constitution. As this Court has reiterated, "state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause[.]" *Printz* v. *United States*, 521 U.S. 898, 928-29 (1997); see *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999) ("State courts, like federal courts, are obliged to enforce federal law."); *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995) ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution."). Indeed, "[t]his Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood* v. *Drown*, 129 S. Ct. 2108, 2114 (2009). Accordingly, when a state court is considering the substance of a claim alleging a federal constitutional violation, a state court is duty-bound to adjudicate the federal question before it may deny relief.

Likewise, California has long recognized that "[t]he supremacy clause of the federal Constitution precludes a state court from arbitrarily refusing to consider 'federal questions' of law." *In re Panchot*, 70

Cal. 2d 105, 107 n.4, 448 P.2d 385 (1968); *Gerry of California* v. *Superior Court*, 32 Cal. 2d 119, 122, 194 P.2d 689 (1949) (concluding that the state courts' "concurrent jurisdiction with the federal courts to enforce federal law . . . creates the duty to exercise it"). Accordingly, in California, if a defendant raises both state-law and federal-constitutional arguments on appeal and there is no state-law error upon which to grant relief, then the state court must resolve the federal question. See, *e.g.*, *People* v. *Cowan*, 50 Cal. 4th 401, 455, 236 P.3d 1074 (2010) ("Because defendant is not entitled to relief on his claimed statutory violation, we turn to his federal constitutional claim."), cert. denied, 131 S. Ct. 1784 (2011); *People* v. *Brown*, 31 Cal. 4th 518, 534-39, 73 P.2d 1137 (2003) (where defendant raised both statutory and constitutional arguments, the California Supreme Court addressed the statutory arguments first and, "[t]here being no statutory basis to find the trial court erred," it then "turn[ed] to defendant's constitutional arguments"); see also *Loder* v. *City of Glendale* 14 Cal. 4th 846, 865, 927 P.2d 1200 (1997) ("Having found that plaintiff's sole statutory challenge to the city's drug testing program is without merit, we turn to plaintiff's constitutional contentions.").

This duty to decide federal constitutional issues is all the more apparent in the context of challenges made by state prisoners. State courts, which "handle the vast bulk of all criminal litigation in this country," "are required to apply federal constitutional standards" to federal issues presented by state criminal

defendants. *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1995). Moreover, the AEDPA reforms of the federal habeas statute were designed to give primacy to the states in adjudicating such claims. *Pinholster*, 131 S. Ct. at 1398-99; *Richter*, 131 S. Ct. at 787; see also *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982). The conclusion that a state court decided, rather than ignored, a federal issue presented to it is also supported by the "presumption of regularity"—i.e., "in the absence of *clear evidence* to the contrary," public officers are presumed to "have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (emphasis added); accord *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); see also Cal. Evid. Code § 664; cf. *Bracy* v. *Gramley*, 520 U.S. 899, 909 (1997) ("presumption of regularity" applied to a state court judge, and rebutted by affirmative evidence).

2. The presumption that state courts carry out their constitutional obligations is corroborated in instances, such as this case, where the state court opinion denying relief actually discussed the substance of the asserted trial error. "[A]n issue may be considered to be adjudicated on the merits 'even when the state court does not specifically mention the claim but uses general language referable to the merits.'" *Eze* v. *Senkowski*, 321 F.3d 110, 122 (2d Cir. 2003) (quoting *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002)). This Court has recognized that "[o]bviously there are instances in which 'the ultimate question

for disposition,' will be the same despite variations in the legal theory or factual allegations urged in its support." *Picard* v. *Connor*, 404 U.S. 270, 277 (1971) (internal citation omitted). Accordingly, when a state court resolves the alleged error—*e.g.*, a juror was improperly removed, inadmissible evidence was allowed at trial, the prosecutor committed misconduct—on substantive grounds, the state court has adjudicated the claim on the merits, even if claim implicated various state-law and federal-constitutional theories.

For example, in *Childers* v. *Floyd*, 642 F.3d 953 (11th Cir. 2011) (en banc), petition for cert. filed, 80 U.S.L.W. 3055 (U.S. Jul. 6, 2011) (No. 11-42), the Eleventh Circuit explained that "[d]eference to the autonomy and dignity of the state courts underlies [a] broad definition" of "adjudication on the merits." *Id.* at 968. It thus held that "an 'adjudication on the merits' is best defined as any state court decision that does not rest solely on a state procedural bar." *Id.* Accordingly, "unless the state court clearly states that its decision was based solely on a state procedural rule, we will presume that the state court has rendered an adjudication on the merits when the petitioner's claim 'is the same claim rejected' by the state court." *Id.* at 969 (quoting *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam)).

3. Another reason to treat a state court's denial of relief as an "adjudication on the merits" where the defendant raises related federal- and state-law theories for relief is that substantive state law often reflects constitutional principles. Sometimes "state

opinions purporting to apply state constitutional law will derive principles by reference to federal constitutional decisions from this Court." *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991). Explicit reliance on state law often necessarily reflects consideration of federal law.

4. Williams might argue that, to qualify for deference under § 2254(d), an explained state-court decision must address the specific federal-constitutional arguments she raised in that court. But that would not be a sufficient reason to depart from the rule advocated by the State.

As this Court has previously explained in reference to its own opinions, specific arguments presented to a court in support of a claim are "implicitly rejected" when the court "refus[es] to address them." *Clemons* v. *Mississippi*, 494 U.S. 738, 747 n.3 (1990) ("We note also that although *Hicks* and a due process rationale were argued by the respondent in *Zant* v. *Stephens*, 462 U.S. 862 . . . (1983), . . . , and by the dissenters in *Barclay* v. *Florida*, 463 U.S. 939, 985-986 . . . (1983), the Court implicitly rejected those arguments in both cases by refusing to address them."); see *Castille* v. *Peoples*, 489 U.S. 346, 351 (1989) ("the claim has been presented as of right but ignored (and therefore impliedly rejected)"). Federal appellate courts adhere to the same rule: when federal courts reject a claim without addressing specific legal arguments in support of it, they implicitly reject those arguments. See, *e.g.*, *Stewart* v. *Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002) (construing the district

court's silence on the issue of Eleventh Amendment immunity as an implicit denial of the defendant state's claim to immunity); *Savage* v. *Hadlock*, 296 F.2d 417, 419 (D.C. Cir. 1961) (concluding that the district court's ruling in favor of the plaintiff constituted an "implicit rejection" of the defendant's argument where the defendant actually raised the argument before the court and "[t]he issue was clearly presented and all the relevant papers were before that court"). And the Ninth Circuit previously has recognized that, given a state court's "conscious[ness] of its duty to respect the dictates of [the federal Constitution]," a state court's "decision not to address [a federal] constitutional issue . . . was an implicit rejection of any error." *Comer* v. *Schriro*, 480 F.3d 960, 983 (9th Cir. 2007) (en banc). Comity counsels treating state-court opinions the same way. See *Francis* v. *Henderson*, 425 U.S. 536, 541 (1976).

5. This realistic approach toward state courts—reflecting appreciation of the fact that they do not ignore federal constitutional arguments in denying relief to criminal defendants—also best reflects the state courts' opinion-writing practices. For example, the California Constitution generally requires state appellate courts to issue written decisions "with reasons stated." Cal. Const. art. VI, § 14; see *People* v. *Kelly*, 40 Cal. 4th 106, 116-17, 146 P.2d 547 (2006). But California does not require its courts to expressly identify each contention raised. Rather, it permits courts to summarily describe them and the reasons they fail. *Kelly*, 40 Cal. 4th at 121; see *id.* at 122.

A citation alone may be used to "identify[ ] the reason a contention raises no arguable issue. . . ." *Id.* at 121 n.4. Moreover, "'[t]he author of an opinion . . . must follow his [or her] own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and *as to the questions which are worthy of notice at all*.'" *Lewis* v. *Superior Court*, 19 Cal. 4th 1232, 1262, 970 P.2d 872 (1999) (ellipsis and brackets in *Lewis*; emphasis added; internal quotation marks omitted). And, California's state constitutional requirement "does not compel the court to discuss all its reasons for rejecting the various arguments of counsel." *Id.* at 1264. Accordingly, because California permits its state courts to summarize the contentions made and leaves the degree of elaboration up to the opinion-writer, § 2254(d) should not require California state courts to separately identify each contention or argument to ensure later application of § 2254(d) deference to their explained decisions.

Nor is there good reason to expect state courts to delineate federal and state claims separately. In sharp contrast to federal habeas courts, see § 2254(a), California courts decide *both* state-law and federal-constitutional questions. In the federal habeas context, it is therefore unsurprising that this Court has defined "claim" in special ways. In the successive-petition context, a claim is "an asserted federal basis for relief from a state court judgment." *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005). In the "exhaustion" context, a claim comprises "reference to a specific federal constitutional guarantee, as well as a statement

of the facts that entitle the petitioner to relief." *Gray* v. *Netherland*, 518 U.S. 152, 162-63 (1996); see *Picard* v. *Connor*, 404 U.S. at 277-78. This standard corresponds with a federal habeas petitioner's "demanding" pleading requirements. See *Mayle* v. *Felix*, 545 U.S. 644, 655 (2005).

But, a federal habeas court's rigid conception of "claim"—necessitated by its limited jurisdiction and the exhaustion requirement—is an ill-fitting construct for state courts, which decide both state-law and federal-law issues and often decide related ones together. No jurisdictional requirements or exhaustion concerns compel a state court to formally separate a claim into a "state-law claim" and a "federal-law claim." Drawing these technical distinctions would be an artificial construction for a state court.

Rather, "claim" should be interpreted "in a commonsense way to mean a right or demand." *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011). A single "claim" in state court may consist of a factual predicate with one or more legal theories or arguments. See, *e.g.*, *People* v. *Brown*, 31 Cal. 4th at 534 (noting that the appellant "raises both [federal] constitutional and [state-law] statutory arguments against the admission of [the witness's] testimony," but addressing them under a single "discussion" subheading). And, "different legal theories . . . do not multiply the number of claims for relief." *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992). Thus, while a federal habeas court might subsequently conclude that a

"state-law claim" exists separately from a "federal-law claim," a state court need not have viewed it that way.

B. The State's interpretation fits comfortably within this Court's "adjudication" and "plain statement" precedents

The conclusion that the state court adjudicated the merits of Williams's entire juror-removal claim—when it denied relief based on its rejection of the contention that the removal of the juror was improper—fits comfortably within this Court's closely-related precedents. *Early* v. *Packer* and *Harrington* v. *Richter* embrace a similar view of whether a state court adjudicated a claim on the merits. And, *Michigan* v. *Long*—applicable to habeas corpus cases under *Harris* v. *Reed*, 489 U.S. 255, 263 (1989)—sets out a similar approach of presuming a decision on the merits of the federal claim in the absence of a plain statement to the contrary.

1. In *Packer*, this Court afforded § 2254(d) deference to a state court's decision where the state court had evaluated the "same claim" that the petitioner later pursued in federal court, even though the state court analyzed the error only by reference to analogous state law and without citing federal cases. *Packer*, 537 U.S. at 7-8. There, when rejecting the defendant's claim that the trial judge's comments to a lone hold-out juror and to the jury "were coercive and denied him his due process right to a fair and impartial jury[,]" the California Court of Appeal applied a

state-court precedent, *People* v. *Gainer*, 19 Cal. 3d 835, 852, 566 P.2d 997 (1977), on coercive comments that threaten a criminal defendant's right under the California Constitution to a unanimous jury. *Packer*, 537 U.S. at 6-7; see *Gainer*, 19 Cal. 3d at 848-49. The state appellate court concluded, under *Gainer*, that comments made or not made by the trial judge "'did not coerce a particular verdict or deny [the defendant] any constitutional rights.'" *Packer*, 537 U.S. at 7. On federal habeas review, the Ninth Circuit granted relief upon finding that the state appellate court's decision was "contrary to established federal law for two, and possibly three, reasons." *Id.* at 8.

This Court reversed the Ninth Circuit. As a preliminary matter, this Court observed that "[t]he jury-coercion claim in [the defendant's] habeas petition is the same claim rejected on the merits in his direct appeal to the state appellate court, and the Ninth Circuit correctly recognized that § 2254(d) was therefore applicable." *Packer*, 537 U.S. at 8. This Court then held that a state court's decision is not "contrary to" clearly established federal law under § 2254(d)(1) just because the state court failed to cite this Court's cases, reasoning that the subsection "does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.*

Thus, *Packer* teaches that there is an "adjudication on the merits" under § 2254(d) when the state court resolves the same claim the petitioner later pursues in federal court, even if the state court's analysis

is confined to state law. Since deference under § 2254(d)(1) does not hinge on whether a state court is aware of federal law, the threshold "adjudication" determination does not turn on whether a state court referred to federal law.

Other federal circuits agree. Relying on *Packer*, they have afforded § 2254(d) deference even where, as here, the state court analyzed the presented claim solely under state law. See, *e.g.*, *Childers*, 642 F.3d at 968-69; *Cox* v. *Burger*, 398 F.3d 1025, 1029-30 (8th Cir. 2005) (rejecting the petitioner's argument that the state court had "failed to directly address the constitutional implications of his Confrontation Clause claim and thus did not adjudicate it on the merits"; explaining that, in light of *Packer*, the "pertinent question is not whether the [state court] explicitly discussed the Confrontation Clause but whether its decision contradicted applicable Supreme Court precedent in its reasoning or result"; and finding that the state court had "effectively adjudicated [the] Confrontation Clause claim on the merits through its analysis of [state law]"); *Hill* v. *Ozmint*, 339 F.3d 187, 195-96 (4th Cir. 2003) (concluding that the state court had adjudicated a defendant's Sixth Amendment claim on the merits when it had "referenced only state law in resolving the claim"; AEDPA's deferential standard of review applied because "the state court, in rejecting [the defendant's] claim, adjudicated it on the merits, regardless of whether it referenced relevant federal law"); *Cook* v. *McKune*, 323 F.3d 825, 830-31 (10th Cir. 2003) (in light of *Packer*, concluding that

the state court had adjudicated a defendant's Sixth Amendment claim on the merits when it had analyzed it under state law rather than discussing the Confrontation Clause precedents and thus concluding § 2254(d)(1) applied).

More recently, this Court held in *Richter* that a state court's summary denial—an order denying a state habeas petition without a statement of reasons—is an adjudication on the merits for purposes of § 2254(d). *Richter*, 131 S. Ct. at 785 ("[Section] 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'"). This is because "[t]here is no text in the statute requiring a statement of reasons. The statute refers only to a 'decision,' which resulted from an 'adjudication.'" *Id.* at 784. The plain language of § 2254(d), therefore, focuses on the result—a judicial ruling on the claim.

Moreover, in deciding "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied[,]" this Court in *Richter* set forth a presumption of a merits-adjudication, stating:

> When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Cf. *Harris* v. *Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (presumption of a merits

> determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis). [¶] The presumption may be overcome when there is reason to think some other explanation is more likely. See, *e.g.*, *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

Richter, 131 S.Ct. at 784-85. This presumption illustrates the broad view that this Court has taken of the phrase "adjudication on the merits."

And, both before and after *Richter*, federal circuit courts have agreed that "[a]n 'adjudication on the merits' is best defined as any state court decision that does not rest solely on a state procedural bar." *Childers*, 642 F.3d at 968 (explaining that, in *Richter*, 131 S. Ct. at 784-85, "the Supreme Court essentially defined the term as such"); *Thomas* v. *Horn*, 570 F.3d 105, 117 (3d Cir. 2009) ("[F]or the purposes of Section 2254(d), a claim has been 'adjudicated on the merits in State court proceedings' when a state court has made a decision that finally resolves the claim based on its substance, not on a procedural, or other, ground."); *Sellan* v. *Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001) (a merits adjudication for AEDPA purposes requires only that a federal claim be raised and then disposed of on substantive, rather than procedural, grounds).

This Court's recent *Packer* and *Richter* opinions thus embrace the proposition that § 2254(d) deference applies even when a state court's explained decision

does not acknowledge this Court's precedents (*Packer*) and even when the state court issues an unexplained summary denial of the petitioner's claim (*Richter*). Those precedents harmonize with the interpretation proposed here: "adjudication on the merits" under § 2254(d) does not require a state court to explicitly discuss the federal Constitution; rather, when a state court rules that no error occurred, it has adjudicated on the merits a federal claim predicated on the allegation of the same error.

2. This Court's "plain statement" cases—*Long*, *Harris*, and *Coleman*—further support the State's argument. Beginning with the appellate decision in *Long*, which was extended to habeas cases in *Harris*, this Court has held that, when faced with ambiguous state court decisions, a federal court must presume that a state court decided a case on federal-law grounds unless a state court makes a plain statement to the contrary. *Harris*, 489 U.S. at 261-63; *Long*, 463 U.S. at 1038-41. This Court adopted this conclusive presumption because the "most reasonable explanation" in such cases is that "the state court decided the case the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040-41.

Coleman, it is true, rejected a broader rule that would have applied the *Long/Harris* presumption in all cases in which a habeas petitioner simply presented his federal claims to the state court. *Coleman*, 501 U.S. at 735-40. Such a view, this Court explained,

did not comply with the "'most reasonable explanation'" for the state court's decision. *Id.* at 737-38.

Here, however, the State's approach is supported not just by the fact that Williams's claim was fairly presented and rejected, but on the confidence-inspiring fact that the state court opinion explicitly came to grips with the error—here, the propriety of removing Juror No. 6—that Williams alleged in her state-court pleadings.

C. The Ninth Circuit's contrary approach is unrealistic and disrespectful of co-equal state courts

The Ninth Circuit's contrary approach—in essence, that any presumption of merits adjudication is overcome if the state court's otherwise explained decision does not mention the specific federal theory urged by the petitioner—cannot be countenanced because it is unrealistic and undermines the principle of comity that guides application of AEDPA.

1. The Ninth Circuit purported to use the *Richter* presumption to overturn a merits adjudication here. PA 23a-25a. But following *Richter*, this Court requires deference under § 2254(d) even where the state courts said nothing at all. Accordingly, in a case like this where the state court issued an explained opinion that explicitly dealt with the substance of the claim, the guiding principles of *Richter* direct that the state-court decision is entitled to no less deference. No mere inference should suffice to permit such a view of the state-court decision. Here, the panel

believed that the sufficient "indication" to overcome the presumption of a merits adjudication was the state court's alleged silence on the Sixth Amendment issue. PA 23a-24a. But it makes little sense to give such determinative effect to a mere negative inference, i.e., that the absence of an explicit discussion of a federal constitutional issue conclusively demonstrates that the state court failed to adjudicate it. As explained above, see Arg. (A), *ante*, the most reasonable reading of an explained decision that actually confronts and discusses the error alleged by the petitioner is that the state court adjudicated the petitioner's demand for relief and rejected it on its merits.

The inadequacy of the negative inference the Ninth Circuit treated as a determinative "indication" is made clear when it is contrasted with this Court's view of what would amount to such a sufficient "indication." In this Court's jurisprudence, "indication" means a "plain statement." In explaining when the merits-adjudication presumption is overcome, *Richter* cited *Harris* v. *Reed*, a "plain statement" case, on the "indication" question. See *Richter*, 131 S. Ct. at 784-85 (citing *Harris*, 489 U.S. at 265). On the cited page of *Harris*, this Court made two points: (1) the doctrine of an independent and adequate state law ground has been extended to federal habeas; and (2) the "plain statement" rule is used to determine whether the state court judgment rested on an independent and adequate state law ground. *Harris*, 489 U.S. at 265. Given this reliance on *Harris*, the term "indication"

as used in *Richter* should be read as meaning a "plain statement." See, *e.g.*, *Brown* v. *Bobby*, 656 F.3d 325, 329 (6th Cir. 2011) (applying the *Richter* presumption and concluding that "the mere fact that the Ohio Court of Appeals did not specifically explain it was ruling on [the defendant's] Sixth Amendment claim does not prevent this court from deferring to that court's opinion on habeas review"), petition for cert. filed, 80 U.S.L.W. 3428 (Dec. 28, 2011) (No. 11-807).

Moreover, given that state courts are presumed to know that they must enforce the federal Constitution, a negative inference from a state court's alleged silence as to the federal issue should not be accepted as sufficient to rebut the presumption of a merits adjudication. See also *Garrett* v. *United States*, 471 U.S. 773, 793 (1985) (legislative silence does not rebut presumption permitting cumulative sentences where Congress creates two distinct offenses); *Albernaz* v. *United States*, 450 U.S. 333, 341-42 (1981) ("[I]f anything is to be assumed from the congressional silence . . . , it is that Congress was aware of the . . . rule and legislated with it in mind.")

To be sure, this Court sometimes has drawn a negative inference from silence. See, *e.g.*, *Lindh* v. *Murphy*, 521 U.S. 320, 329 (1997) (drawing a negative inference from one AEDPA provision's explicit reference to pending cases to conclude that a second AEDPA provision did not apply to pending cases). But, as Justice Scalia, joined by Justices Thomas and Alito, later explained: "The negative inference of *Lindh* rested on the fact that '*[n]othing* . . . but a different

intent explain[ed] the different treatment.'" *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 662 (2006) (Scalia, J., dissenting) (emphasis added; brackets and ellipsis in *Hamdan*) (citing *Lindh*, 521 U.S. at 329). Here, by contrast, there are compelling reasons to conclude that the state court adjudicated the federal issue on the merits. As discussed above, it is presumed that state courts know the law and performed their duty. And that conclusion is confirmed by the fact that the state court opinion addressed the *substance* of the federal issue, i.e., the propriety of the juror's removal, on its merits.

2. The Ninth Circuit's view would also inappropriately require state courts to employ particular language to ensure that federal habeas courts will accord their rulings the deference required by § 2254(d). But the comity principle reflected in AEDPA militates against any obligation to use such "magic words." As this Court has explained, federal courts "have no power to tell state courts how they must write their opinions." *Coleman*, 501 U.S. at 739. This Court "will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case." *Id.*

Requiring the state courts to employ particular language to trigger AEDPA deference impermissibly interferes with the state opinion-writing practices

that properly "are influenced by considerations other than avoiding scrutiny by collateral attack in federal courts." *Richter*, 131 S. Ct. at 784. For example, in California, the degree of elaboration required "is not subject to measurement by objective criteria," but rather is a "subjective determination." *Lewis* v. *Superior Court*, 19 Cal. 4th at 1262. Requiring inclusion of certain "magic words" would conflict with California's approach. Telling state courts how to write their opinions in order to avoid scrutiny by collateral attack in federal courts undermines comity and "smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era." *Wright* v. *Secretary for Dept. of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). Federal habeas corpus is "not a license to penalize a state court for its opinion-writing technique." *Lafler* v. *Cooper*, No. 10-209, 2012 WL 932019, *17 (U.S. Mar. 21, 2012) (Scalia, J., dissenting).

3. The Ninth Circuit's rule, moreover, is built upon an unlikely and untoward circumstantial inference—that the state appellate courts just overlooked or disregarded the federal claim. See PA 24a-25a & 25a n.11. But, it ill-behooves comity for a federal court, through the use of a negative inference, to ascribe to the state court negligence in derogation of its duty to enforce federal law. This readiness to attribute error to the state courts is "inconsistent with the presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (internal citations omitted); accord *Lafler* v. *Cooper*, 2012 WL 932019 at *17

(Scalia, J., dissenting); see also *Stone* v. *Powell*, 428 U.S. 465, 493-94 n.35 (1976) (dismissing "policy arguments" that "stem[med] from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights").

The cases upon which the Ninth Circuit relied to find that a state court failed to pass upon the federal constitutional argument, see PA 27a-28a, suffer from the same flaws. In *Canaan* v. *McBride*, 395 F.3d 376, 381-82 (7th Cir. 2005), where the federal circuit court found no adjudication on the merits where the petitioner had argued that his trial counsel was ineffective for failing to call a witness and failing to discuss that decision with him, and the state court "never addressed" the failure-to-consult "argument." But *Canaan* cannot be reconciled with this Court's precedent, discussed at pages 29-30, *ante*, that a court's refusal to discuss an argument means that it rejected it. The same is true of *Weeks* v. *Angelone*, 176 F.3d 249, 262-63 (4th Cir. 1999). Additionally, because "adjudication on the merits" does not require a state court to discuss the federal Constitution, the Sixth Circuit's decision in *Lyell* v. *Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006)—applying *de novo* review where a petitioner "presented federal polling and fair-trial claims to the state court of appeals[,]" but "the state court of appeals addressed [the] claims only in state-law terms in its decision"—cannot stand. Finally, the Ninth Circuit analogized the instant case to *Hameen* v. *Delaware*, 212 F.3d 226, 246-48 (3d Cir. 2000), a pre-*Packer* case concluding that *de novo* review

applied because, even though the state court relied on a Supreme Court precedent, it had read the case "too broadly." But, *Hameen* assumed that a state court's consideration of "controlling Supreme Court decisions" was necessary for an "adjudication on the merits," *id.* at 248, and thus cannot survive this Court's rejection of that view in *Packer*.

In any event, a state-court remedy already exists to forestall the possibility that a claim can simply be ignored: a petition for rehearing. California has long held that "[p]etitions for rehearing are permitted . . . to direct the attention of the court to matters presented at the argument which may have been overlooked in the decision." *San Francisco* v. *Pacific Bank*, 89 Cal. 23, 25, 26 P. 615 (1891) (per curiam); see also Cal. Ct. R. 8.500(c)(2) (party petitioning for review should have "called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing"). Other states similarly provide this remedy for alleged omissions. See, *e.g.*, Ill. S. Ct. R. 367(a) (rehearing petition "shall state briefly the points claimed to have been overlooked or misapprehended by the court"); *Sheehan Const. Co., Inc.* v. *Continental Cas. Co.*, 938 N.E.2d 685, 687 n.1 (Ind. 2010) ("'A petition for rehearing is a vehicle that affords the reviewing court the opportunity to correct its own omission or errors.'"); *Kennedy* v. *South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.");

Marriott Int'l, Inc. v. *Perez-Melendez*, 855 So.2d 624, 632 (Fla. App. 2003) (permitting "motion for rehearing to bring to the court's attention a point of law or fact that the court has overlooked or misapprehended"). In light of this broadly-available remedy, there is even less reason for a federal court to merely assume that a state court has overlooked a federal claim.

Tellingly, Williams never argued that the California Court of Appeal failed to adjudicate any part of her juror-removal claim. She never complained in state court that, either by petition for rehearing or in her petition for review, the California Court of Appeal had failed to adjudicate her Sixth Amendment argument. Likewise, nowhere in federal court, either in her petition or in her Ninth Circuit briefing, did she make that complaint. Instead, in her Ninth Circuit briefing, she explicitly stated that "[t]he California Court of Appeal rejected [her] claims" and acknowledged that § 2254(d) controlled the disposition of the case. AOB 28-29.

Indulging in facile inferences that a state court has ignored a federal claim would lead to "deleterious substantive consequences" at odds with the spirit of AEDPA. See *Sellan* v. *Kuhlman*, 261 F.3d at 313-14.

> [It] could encourage state prisoners to press their federal claims in state court in an essentially cursory manner—just enough to exhaust state remedies and to avoid default or waiver, but not too strongly—with the hope that the state court will not 'refer to' or engage in any lengthy discussion of their

> federal claims, thus entitling the prisoner to *de novo* consideration of these claims on federal habeas review.

Id. This segregation of claims—state claims to state courts, and federal claims to federal habeas courts—would "be at odds with the animating spirit of AEDPA which respects the state court's adjudication of *all* claims." *Id.* at 314 (original emphasis).

4. The Ninth Circuit's approach also should be condemned as a "do-it-yourself" circumvention of § 2254(d) deference. Here, the Ninth Circuit inferred that there had been no adjudication of Williams's "constitutional claim" because the California precedent the state appellate court had relied on, *Cleveland*, has "expressly rejected the juror-discharge standard adopted by the Second, Ninth, and D.C. Circuits." PA 26a (original emphasis omitted). But the Ninth Circuit would have been forbidden by the § 2254(d) deference rule from relying only on the peculiarities of the law to grant relief on a habeas corpus claim adjudicated on the merits in state court. *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006); *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 412 (2000). Likewise, the panel here must not be allowed, under the guise of deciding the triggering "adjudication" question, to resort to that same view of its own law to short-circuit § 2254(d) deferential review at the threshold.

D. The particular circumstances of this case validate the State's approach

The underlying features of Williams's case confirm the wisdom of a per se rule recognizing an adjudication on the merits of a federal claim under § 2254(d) whenever the state court denied relief to the prisoner and its opinion addressed the error or malfunction about which the prisoner complained. Here, there can be no dispute that the California Court of Appeal resolved the question of the alleged erroneous removal of the juror on substantive grounds. The court examined whether the record supported the trial court's determination that Juror No. 6 was biased, PA 97a-103a, concluded that it did, PA 104a-05a, and denied relief for that reason.

Treating Williams's complaint that way was natural. On direct appeal, Williams did not separate her Sixth Amendment argument from her state-law argument. Rather, under a single argument heading—which under California law signals one claim, Cal. Ct. R. 8.204(a)(1)(B) ("[s]tate each point under a separate heading or subheading")—she presented one integrated juror-removal claim, alleging that her state and federal rights had been violated. JA 25-67. Moreover, her federal-constitutional argument was intertwined with, and dependent upon, her state-law argument: she argued that "[t]he [trial] court clearly abused its discretion in discharging Juror No. 6 and [Williams] was *thereby* denied her Sixth Amendment right to a unanimous jury." JA 67 (emphasis added); see JA 27-29; JA 108; see also JA 121 (arguing Juror

No. 6 did not commit misconduct under *Cleveland*, and thus Williams "was *accordingly* denied her Sixth Amendment right to a unanimous jury when Juror No. 6 was discharged" (emphasis added)). Given this integrated construction, the California Court of Appeal would have had no reason to separate it into two distinct claims. Instead, the state court appropriately described Williams's "claim" as "contend[ing] the trial court erred by discharging one of the jurors during deliberations." PA 97a.

This resolution of the asserted alleged error adjudicated both the state-law and federal-constitutional aspects of her single claim because the state court reasonably could have concluded that the "ultimate question for disposition" posed by the state-law component of the claim—whether "good cause" existed for removing the juror pursuant to California Penal Code section 1089—and by the Sixth Amendment question—whether section 1089 was unconstitutional as applied—was the same. See *Picard* v. *Connor*, 404 U.S. at 277. The ultimate question was whether the juror was improperly removed. And that turned on deciding whether the juror was biased, i.e., whether he lacked impartiality, because keeping a biased juror on the panel would have violated the requirement of an impartial jury. See, *e.g.*, *United States* v. *Wood*, 299 U.S. 123, 133 (1936) (the Sixth Amendment requires trial by an impartial jury, and "[a]ll persons otherwise qualified for jury service are subject to examination as to actual bias"); *Nesler*, 16 Cal. 4th at 578, 590 (presence of biased juror violated state and federal

constitutional requirements of an impartial jury, and the state constitutional guarantee of a unanimous jury). Thus, the state appellate court adjudicated the Sixth Amendment issue when, by concluding that the finding of bias justified the removal of the juror, it rejected on substantive grounds the allegation that the removal of the juror was improper.

c. In addition, the California Court of Appeal relied on California substantive law that had its foundation in federal constitutional principles. See *Coleman*, 501 U.S. at 732. When examining whether "the trial court erred in discharging [Juror No. 6] during deliberations[,]" PA 97a, the state appellate court considered what constitutes "actual bias" in terms of both state law and the federal Constitution. PA 104a. "'In assessing whether a juror is "impartial" for federal constitutional purposes,'" it quoted language from this Court's Sixth Amendment impartial-jury-right jurisprudence, explaining that impartiality is "'"a state of mind"'"—"'"a juror who has formed an opinion cannot be impartial[ ]"'" whereas "'[a]n impartial juror is someone capable and willing to decide the case solely on the evidence presented at trial.'" *Id.* (quoting *Nesler*, 16 Cal. 4th at 580-81, quoting in turn, *United States* v. *Wood*, 299 U.S. at 145-46, *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961), *Reynolds* v. *United States*, 98 U.S. 145, 155 (1878), and *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982)). The California Court of Appeal did this as part of its explicit reliance on the California Supreme Court's opinion in *Nesler*, itself a case that had considered

whether a biased juror's presence on a jury panel had violated a state criminal defendant's state and federal constitutional "right to a trial by 12 impartial jurors." See *Nesler*, 16 Cal. 4th at 578, 580. The state appellate court explained that California law defines actual bias in terms of a juror's state of mind lacking "entire impartiality," and that a sitting juror's actual bias "renders the juror unable to perform his or her duties and thus subject to discharge." PA 104a (quoting *Nesler*, 16 Cal. 4th at 581) (internal quotation marks omitted).

"Actual bias" (i.e., a lack of entire impartiality) sufficient to subject a juror to discharge in California thus was derived from the Sixth Amendment protection of a trial by an impartial jury. The common "federal-rights backdrop" provides a further reason to conclude that the California Court of Appeal recognized and adjudicated the claimed federal-constitutional aspect of Williams's juror-removal claim. *Clements* v. *Clarke*, 592 F.3d 45, 53-55 (1st Cir.), cert. denied, 130 S. Ct. 3475 (2010) (state-court opinion addressed the fairly raised federal issue by its citation of a state case that, in turn, had quoted this Court's decision in *Irvin* v. *Dowd* that "'the right to a jury trial guarantees the criminally accused [] a fair trial by a panel of impartial, "indifferent" jurors'"). Absence of an express acknowledgement of the federal-law basis for a claim, therefore, is not determinative of whether the state court adjudicated the federal constitutional issue. As one circuit court has said:

"[J]udicial opacity is a far cry from judicial avoidance." See *Clements*, 592 F.3d at 55.

The California Court of Appeal's use of general language, broad enough to encompass both the state-law and federal-constitutional aspects of Williams's claim, also corroborates the conclusion that it adjudicated the entirety of her challenge to the juror's removal. Here, in conformity with state law, the California Court of Appeal's opinion framed the issue in general but accurate language: "Williams contends the trial court erred by discharging one of the jurors during deliberations." PA 97a. It also rejected the claim using general language, concluding: "This claim is meritless." *Id.* The court further explained, "The evidentiary hearing supported the trial court's finding of bias." PA 104a. The court of appeal did not limit the claim, or its rejection thereof, to state law. Rather, the state appellate court's language encompassed both state-law and federal-constitutional legal theories. See *Eze* v. *Senkowski*, 321 F.3d at 122.

Finally, the California Court of Appeal later expressly ruled that it had not overlooked the claim. Williams reiterated her juror-removal challenge in a habeas petition filed in the state appellate court, raising eight separately enumerated "arguments," JA 150-64, and specifically referring to the Sixth Amendment, JA 160. In denying habeas relief, the California Court of Appeal considered all of Williams's juror-removal arguments to be raising a single claim—"the *propriety* of the discharge of juror no. 6"—and ruled it had been "raised and rejected on

appeal[.]" PA 81a (emphasis added). That broadly-stated ruling "provides strong evidence that the claim has already been given *full* consideration by the state courts. . . ." See *Cone* v. *Bell*, 129 S. Ct. 1769, 1781 (2009) (emphasis added).

Under all these circumstances, the conclusion that the state court adjudicated the merits of the federal-component of the claim is the only reasonable one.

* * *

In sum, a state court is not required to expressly discuss the federal-law basis of the claim in order to "adjudicate" it "on the merits" for purposes of § 2254(d) review in later federal habeas corpus proceedings. Rather, when the state court has addressed the substance of the alleged error, it has adjudicated the claim. That adjudication is on the merits absent a plain statement to the contrary.

Here, the California Court of Appeal denied relief in an explained decision discussing the propriety of removing Juror No. 6. It therefore adjudicated the entirety of Williams juror-removal claim on the merits. The Ninth Circuit erred in failing to review that adjudication deferentially under § 2254(d). The California Court of Appeal adjudicated the entirety of Williams's juror-removal claim on the merits for purposes of § 2254(d) when it denied relief in an explained decision discussing the propriety of removing Juror No. 6.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

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In The

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DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Harrington v. Richter held that although a California court's unexplained collateral review order is presumptively a merits adjudication, a state rule, or, a more-likely explanation, rebuts that presumption. Here, on direct appeal, the State's brief ignored Ms. Williams' fairly presented Sixth Amendment juror-discharge claim, and the state appellate court followed suit, analyzing the issue exclusively under a state statute that provides less protection than the Sixth Amendment standard. Did the panel below correctly conclude Ms. Williams overcame *Richter*'s presumption?

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RESPONDENT'S BRIEF

Ms. Tara Sheneva Williams submits this brief to support affirming the Ninth Circuit's judgment.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[1]

California Constitution Article I, § 16 provides: "Trial by jury is an inviolate right. . . . In criminal actions in which a felony is charged, the jury shall consist of 12 persons."[2]

California Constitution Article VI, § 14 provides: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."[3]

California Penal Code Section 1089 (Section 1089) provides:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to

[1] U.S. Const. amend. VI.

[2] Cal. Const. art. I, § 16.

[3] Cal. Const. art. VI, § 14.

> perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.[4]

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[5] provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was ***adjudicated on the merits*** in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination

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[4] Cal. Penal Code § 1089 [hereinafter Section 1089].

[5] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, § 104 (1996).

of the facts in light of the evidence presented in the State court proceeding.[6]

STATEMENT OF THE CASE

One afternoon, Ms. Williams agreed to drive Carde Taylor and Schantel W. around so they could case stores for a potential robbery that was to take place later that night. One store they visited was a liquor store, which Taylor and Schantel entered while Ms. Williams waited in the car. The two emerged a few seconds later, but then Taylor went back in, pointed a gun at the proprietor and, in the course of emptying the cash register, shot and killed him. Taylor and Ms. Williams eventually admitted to being present and confirmed that Taylor had killed the owner. Ms. Williams told the police that, while she knew Taylor was armed, there had never been a plan to rob the store during daylight hours.[7]

Taylor and Ms. Williams were each charged with special-circumstances murder and a firearm enhancement; they were tried separately. After a five-day jury trial, Ms. Williams was found guilty of special-circumstances murder and the firearm enhancement,

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[6] 28 U.S.C. § 2254(d) (emphasis added).

[7] State's Appendix to Petition for Writ of Certiorari 6a [hereafter PA].

which resulted in a sentence of life imprisonment without the possibility of parole.[8]

But Ms. Williams was convicted only after the trial court dismissed a known holdout juror (Juror No. 6), and replaced him with an alternate.[9] That dismissal forms the basis for habeas relief.

After two days of deliberations, the jury foreperson delivered two notes to the trial court. The first note referenced California's anti-jury nullification instruction and indicated that one juror had expressed: (1) an intention to disregard the law; and (2) concern relative to the severity of the charge (1st degree murder).[10] The second note asked if it was permissible for a juror to interpret the jury instructions to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future.[11]

The trial judge told the jurors that the answer to note number two was "no." After excusing all the jurors other than the foreperson, the trial judge questioned him about the first note. After confirming that no juror had expressed concern about punishment, the trial judge asked what the foreperson meant by the phrase "has expressed concern relative

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[8] PA 6a.

[9] PA 7a.

[10] PA 7a-8a.

[11] PA 8a.

to the severity of the charge." The foreperson responded that the juror in question "has probably ten or fifteen times in our conversations so far expressed that . . . *he does not believe that there's sufficient evidence*. . . ."[12]

During further questioning by the court, the foreperson indicated that the judge's answer to note number two "may be sufficient to resolve our concern at this time." But the judge, upon the State's motion, and over Ms. Williams' objection, halted jury deliberations and questioned the foreperson again the next day. The foreperson then described comments that Juror No. 6 made during deliberations about historical instances of jury nullification and about the "need for a higher standard" of proof given the severity of the first-degree murder charge.[13] The foreperson stated that Juror No. 6 had tried to explain "the basis for his reasonable doubt. . . ."[14]

The judge then questioned Juror No. 6, who confirmed that he was not engaging in jury nullification,[15] but admitted saying during deliberations that given the importance of the case (i.e., the severity of the murder charge) "we should be *very* convinced that if the defendant is found guilty that it is beyond a

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[12] PA 8a (emphasis added).

[13] PA 8a-9a.

[14] PA 9a-10a.

[15] PA 11a-12a.

reasonable doubt."[16] The court asked Juror No. 6 what the difference was between convinced beyond a reasonable doubt and "very" convinced. Juror No. 6 responded that they are the same thing: "[C]onvinced beyond a reasonable doubt is the standard, and I don't think that there is a difference between convinced beyond a reasonable doubt and *very* convinced beyond a reasonable doubt. I think it's the same thing."[17]

The prosecutor asked the court to remove Juror No. 6, and the judge indicated that he was inclined to rule that the juror committed misconduct by applying a higher burden of proof than the law requires and by intentionally withholding information from the court about linking the severity of the charge with the burden of proof.[18] But to develop a "fuller record," the court questioned all remaining ten jurors about Juror No. 6.[19]

After questioning all the jurors, the trial court dismissed Juror No. 6 under Section 1089. The trial court dismissed Juror No. 6 "not because he's not deliberating and not because he's not following the law," but because he was "biased" because "his mind is bent . . . against the prosecution."[20]

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[16] PA 11a (emphasis added).

[17] PA 11a (emphasis added).

[18] PA 12a.

[19] PA 12a-13a.

[20] PA 13a, 42a n.18.

The following day, the alternate juror that replaced Juror No. 6 voted with the majority in returning a guilty verdict.[21]

Ms. Williams appealed, claiming that the trial court had abused its discretion in applying Section 1089, and also violated her Sixth Amendment rights, by dismissing Juror No. 6.[22]

Her direct appeal opening brief challenged the trial court's decision to exclude holdout Juror No. 6.[23] That brief stated that replacing Juror No. 6 during deliberations violated her "Sixth Amendment right to a unanimous jury, requiring her conviction to be reversed."[24] That brief also cited, and discussed, three federal appellate cases that define the Sixth Amendment standard designed to protect the jury-trial right by minimizing invasive questioning of deliberating jurors and by prohibiting dismissing jurors based on their views on the merits of the case: (1) *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987); (2) *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997); and (3) *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999).[25]

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[21] PA 14a.

[22] PA 14a.

[23] Joint Appendix (JA) 24-67.

[24] JA 29.

[25] JA 30-31.

Because the federal Sixth Amendment protection is distinct from and greater than that provided by Section 1089, Ms. Williams' opening brief quoted at length from *Thomas*[26] concerning the protective Sixth Amendment standard: "[I]f the record evidence discloses *any possibility* that a complaint about a juror's conduct stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request. . . ."[27]

And in her one-paragraph "Conclusion," Ms. Williams' brief contended that discharging Juror No. 6 violated her "Sixth Amendment right to a unanimous jury."[28] To support this contention, Ms. Williams again cited *Brown*, 823 F.2d at 597, and also cited *Perez v. Marshall*, 119 F.3d 1422, 1426-28 (9th Cir. 1997). The Ninth Circuit in *Perez*, facing a Sixth Amendment challenge on federal habeas, analyzed a California trial court's Section 1089 finding that good cause existed to remove a holdout juror.[29] *Perez* recognized that Section 1089's facial constitutionality does not mean its *application* is constitutional because removing a juror under Section 1089 would violate the Sixth Amendment if motivated by that deliberating juror's views on the merits of the case.[30]

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[26] JA 35-36 n.12.

[27] JA 32 n.10 (emphasis added).

[28] JA 67.

[29] *Perez*, 119 F.3d at 1426.

[30] *Id.* at 1428. *See* JA 67 (citing *Perez*, 119 F.3d at 1426-28).

Instead of responding to Ms. Williams' Sixth Amendment claim, the State's appellate brief analyzed her juror-discharge challenge solely in terms of Section 1089, without any reference whatsoever to her Sixth Amendment claim.[31]

Ms. Williams' state-appellate reply brief reiterated her Sixth Amendment argument.[32]

As with the State's appellate brief, the state appellate court's 29-page opinion,[33] which contains a detailed analysis of Section 1089, says nothing directly or indirectly about Ms. Williams' Sixth Amendment claim.[34] The state appellate court explicitly adjudicated only Ms. Williams' Section 1089 claim, but not her constitutional claim. It held that the trial court did not abuse its discretion under Section 1089, because sufficient evidence supported the trial court's finding that Juror No. 6 met the definition of "actual bias" under the statute. It did not mention, however, whether removing the known holdout juror violated the Sixth Amendment.[35]

Ms. Williams petitioned the California Supreme Court to review her direct appeal loss.[36] That court

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[31] JA 2, 68-95.

[32] JA 2, 96-108.

[33] JA 2.

[34] PA 14a, 103a-105a.

[35] PA 22a.

[36] JA 3.

granted the petition for review and summarily vacated and remanded for further consideration[37] in light of *People v. Cleveland*.[38] *Cleveland* explicitly rejected the distinct, more-protective federal Sixth Amendment standard "that precludes dismissal of such a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.'"[39] Instead of applying this federal standard, *Cleveland* explicitly "adhere[d] to" the distinct California rule that gives trial judges broad leeway to question deliberating jurors where a juror may not be participating in deliberations "and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate."[40] Ms. Williams and the State submitted supplemental briefs addressing *Cleveland*.[41]

The state appellate court then issued a slightly modified version of its previous reasoned opinion, again affirming Ms. Williams' conviction in a new 29-page decision.[42] That second 29-page opinion constitutes the state court's last reasoned opinion.[43] It too did not address Ms. Williams' Sixth Amendment challenge, at

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[37] JA 3.

[38] 21 P.3d 1225 (Cal. 2001).

[39] *Id.* at 1236-27.

[40] *Id.* at 1237.

[41] JA 4-5.

[42] JA 5; PA 87a-118a.

[43] *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-06 (1991).

all.[44] The portion of the state appellate court's opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying Section 1089.[45] The state appellate court wrote:

> Penal Code section 1089 allows the trial court to discharge a juror who "upon . . . good cause shown to the court is found to be unable to perform [her] duty." We review for abuse of discretion the trial court's determination to discharge a juror and order an alternative to serve. If there is any substantial evidence supporting the trial court's ruling, we will uphold it. We also have stated, however, that a juror's inability to perform as a juror "must appear in the record as a demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)[46]

Ms. Williams filed a second Petition for Review in the California Supreme Court requesting discretionary review of her second direct appeal loss.[47] The Petition for Review argued that relief was warranted under *Cleveland*. It also argued that discharging Juror No. 6 violated the "Sixth Amendment" jury-trial right because the trial court discharged Juror No. 6 "after [Juror No. 6] actively participat[ed] in

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[44] PA 14a.

[45] PA 14a, 103a-105a.

[46] PA 103a (internal quotation marks and citations omitted).

[47] JA 5-6.

deliberations during which he 'probably ten or fifteen times' said that he did not believe 'that there's sufficient evidence' for conviction."[48] But the California Supreme Court declined discretionary review in a one-page order without explanation or citation to authority.[49] Looking through this unexplained order,[50] the state appellate court's opinion on direct appeal constitutes the last reasoned opinion in the California courts. Thus, the parties and the federal courts below looked to that opinion in reviewing Ms. Williams' federal petition.[51]

Ms. Williams, proceeding pro se, timely filed a federal habeas petition in the appropriate district court, containing about 9 exhausted and 4 unexhausted claims.[52] Grounds 10-13 all raised unexhausted jury instruction claims. But grounds 2-9, presented segregated factual facets of the juror-discharge challenge at issue here. The State moved to dismiss the petition because it contained some unexhausted claims.[53] The United States district court indicated that the State's Motion to Dismiss "apparently concedes that [Ms. Williams] has in fact exhausted Grounds 2 through 9 in her Petition for Review filed in the California

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[48] JA 148.

[49] PA 85a.

[50] *Ylst*, 501 U.S. at 803-06.

[51] PA 87a-118a.

[52] JA 9.

[53] JA 10 (Docket No. 9).

Supreme Court."[54] But because other grounds, not at issue here, were not exhausted, the district court stayed the case to allow for complete exhaustion of state-court remedies.[55] After Ms. Williams spent many months exhausting her new claims via state-court habeas petitions,[56] the United States district court let her file an amended habeas petition.[57]

Ms. Williams found an attorney who substituted in to file an amended federal habeas petition for her.[58] As the district court noted, that attorney's First Amended Habeas Petition abandoned Ms. Williams' newly exhausted claims, and presented only the claims that appellate counsel had previously presented, and exhausted, on direct appeal.[59]

Because Ms. Williams' first amended petition only presented the claims that had been exhausted on direct appeal, Ms. Williams' state habeas petitions and their dispositions are irrelevant to this case. But a summary is footnoted here to clarify the record.[60]

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[54] JA 14 (Minute Order, Docket No. 14, p. 2).

[55] JA 10-11.

[56] JA 10-11.

[57] JA 11.

[58] JA 11 (Substitution of Attorney, Docket No. 54).

[59] JA 12 (Docket No. 56).

[60] Ms. Williams filed pro se habeas petitions in the state appellate court and supreme court. Those petitions contain numerous challenges that are similar to those that had been raised on appeal. Although the petition filed in the state appellate court invoked the Sixth Amendment in the middle of one

(Continued on following page)

The United States district court dismissed Ms. Williams' first amended petition in 2007 on the merits.[61]

Following Ms. Williams' notice of appeal,[62] the Ninth Circuit granted Ms. Williams' request for a certificate of appealability.[63] The Ninth Circuit held oral argument on August 2, 2010,[64] at which time it asked the State: "Where in its decision did the Court of Appeal decide the question of whether there was a Sixth Amendment violation?"[65] The State responded: "The Court of Appeal does not discuss the Sixth Amendment."[66]

Given this concession, the published panel opinion below found AEDPA deference inapplicable, but only after finding no plausible explanation, other than oversight, for the state court's failure to mention

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paragraph, JA160, the petition she filed in the California Supreme Court did not mention the Sixth Amendment, but instead presented the juror challenge as a due process challenge. U.S. Dist. Ct. Docket No. 71, Lodgment No. 21 (Cal. Supreme Ct. Petition S122165). Both the state appellate and supreme courts denied habeas relief, not on the merits, but on the ground that the juror-discharge challenge had already been raised and rejected on direct appeal. PA 79a, 81a. Thus, those courts did not reach the merits of the juror-discharge claim, but instead expressly avoided deciding the claim.

[61] JA 14.

[62] JA 14.

[63] JA 17.

[64] JA 21.

[65] PA 20a.

[66] PA 21a. *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011).

the federal claim directly or indirectly.[67] Distinguishing a prior en banc Ninth Circuit plurality opinion that enforced AEDPA deference where there was at least an "indication" that the state court had addressed a federal claim, albeit "only obliquely,"[68] the panel below observed that the "state court did not address [Ms. Williams'] claim, obliquely or otherwise, and there is not a scintilla of evidence that the [California] Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed at length."[69]

Because the state appellate court did not address Ms. Williams' Sixth Amendment claim in any fashion, even indirectly,[70] that court did not mention, nor did it apply, the following Sixth Amendment standard governing juror discharge challenges: "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror."[71] Instead, applying an abuse-of-discretion standard, the state appellate court only asked whether the dismissal was supported by record

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[67] PA 18a-28a.

[68] PA 23a-24a n.10 (quoting *Murdoch v. Castro*, 609 F.3d 983, 990 n.6 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011)).

[69] PA 23a-24a n.10.

[70] PA 14a, 23a, 27a.

[71] PA 38a n.16 (quoting *Symington*, 195 F.3d at 1087).

evidence of the juror's "inability to perform as a juror. . . ."[72]

Although *Harrington v. Richter* by its terms applies only to summary, *unreasoned* orders on collateral review,[73] the Ninth Circuit assumed that *Richter*'s presumption applied to the *reasoned* state appellate opinion at issue here. Thus, the Ninth Circuit opinion applied *Richter* to this case, and concluded that the exception to *Richter*'s presumption applies.[74] In applying *Richter*'s exception, the Ninth Circuit assessed the available, relevant information in determining whether there really was reason to conclude that the state court had simply missed or ignored the Sixth Amendment claim.

The panel below noted that the state appellate court engaged in an extended discussion of Ms. Williams' statutory claim, but made no mention whatsoever of her more fundamental constitutional claim.[75] The panel found this was a compelling "indication" under *Richter* that the state appellate court either overlooked or disregarded her Sixth Amendment claim entirely, rather than adjudicating the claim, but offering no explanation at all for its decision.[76] Applying *Richter*, the panel acknowledged that when a court simply says "claims denied," and nothing more,

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[72] PA 103a.

[73] 131 S. Ct. 770 (2011)

[74] PA 16a-23a.

[75] PA 14a, 22a-28a.

[76] PA 24a.

courts presume that the denial is on the merits and as to all claims. But when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of the federal claim, "there is reason to think" that it "is more likely" that the court simply neglected the issue and failed to adjudicate the claim.[77]

Given this "more likely" explanation under *Richter*, the Ninth Circuit reviewed Ms. Williams' Sixth Amendment juror-discharge claim *de novo*, and remanded to the district court with instructions to grant the writ based on the dismissal of the holdout juror where there was a reasonable possibility the dismissal stemmed from the deliberating juror's views on the merits of the case.[78]

The State moved for panel rehearing and rehearing en banc.[79] But the Ninth Circuit denied rehearing after no Circuit Judge requested a vote.[80]

This Court granted certiorari on the AEDPA adjudication-on-the-merits question, but denied certiorari on the substantive Sixth Amendment claim.[81]

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[77] PA 24a-25a.

[78] PA 1a-52a.

[79] JA 22.

[80] JA 22-23.

[81] JA 23.

SUMMARY OF ARGUMENT

By its terms, § 2254(d) applies to a claim for federal habeas relief only if that claim has previously been "adjudicated on the merits" by a state court. And in the vast majority of cases, whether such an adjudication occurred is easily determined from the face of the state court opinion.

But as this Court's cases have recognized, it is sometimes necessary to: infer the basis of the state court decision from less than complete information, or acknowledge that the state court's resolution of the merits was only partial or expressly nonexistent.

The first situation was addressed in *Harrington v. Richter*, which held that: "When a federal claim has been presented to a state court and the state court has denied relief [on collateral review in an *unexplained* order], it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[82]

The second situation arose in a series of decisions (*Wiggins v. Smith*,[83] *Rompilla v. Beard*,[84] and *Porter v. McCollum*[85]), in which the state court's *reasoned* opinion made plain that while one component of the

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[82] 131 S. Ct. at 784-85.

[83] 539 U.S. 510 (2003).

[84] 545 U.S. 374, 390 (2005).

[85] 130 S. Ct. 447 (2009) (per curiam).

prisoner's two-pronged federal claim was addressed, the other was not. Similarly, the second situation also arises, as in *Cone v. Bell*, where the state court's *reasoned* opinion expressly indicates that it was not adjudicating the prisoner's federal claim at all because of a state procedural bar.[86]

The issue presented here falls somewhere between the two categories represented by (1) *Richter* and (2) the *Wiggins-Rompilla-Porter-Cone* line of decisions.

Simply stated, the question here is how to determine whether a state court has adjudicated the merits of a fairly presented federal claim when the state court's *reasoned* opinion speaks exclusively in terms of state, rather than federal, law. The answer to this question is not fully provided by *Richter*'s rebuttable presumption, which is a blunt instrument that is necessary only when faced with an *unexplained* state court decision.

Instead, determining whether a reasoned state court decision (like the one here) includes an adjudication of the merits of a federal claim is best (i.e., most accurately) accomplished by analyzing the actual content of the state court's reasoned opinion. First, that is how this Court has analyzed the issue in the analogous contexts illustrated in *Wiggins*, *Rompilla*, *Porter*, and *Cone*. Second, this Court's mode

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[86] 556 U.S. 449, 472 (2009).

of analysis in *Early v. Packer*[87] shows that a determination of whether a *reasoned* opinion adjudicates a federal claim involves analysis of that reasoned opinion's content. Finally, this approach is also how the lower federal courts have analyzed the issue since § 2254(d)'s "adjudicated on the merits" requirement became a consideration in federal habeas cases.

While this method requires a "case by case" assessment,[88] the number of cases in which it is necessary is quite small (much smaller than the flow of unexplained state habeas decisions in California), and the analysis necessary to make the assessment is not particularly challenging.

The federal courts of appeals have developed a set of logical, easily administrable criteria for determining whether a state court decision speaking only in state law terms should nevertheless be construed as an adjudication on the merits of a federal constitutional claim. Those criteria appear at pages 31-35 below.

This approach has worked for the federal courts for years, and it does not need to be changed. Unlike the unrebuttable presumption advocated by the state, the traditional approach relies on tangible information to reach an informed result, as the exception to *Richter*'s presumption appears designed to do.

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[87] 537 U.S. 3 (2002) (per curiam).

[88] *Brown v. Luebbers*, 371 F.3d 458, 461 (8th Cir. 2004) (en banc).

Under this approach, the Ninth Circuit determined that the state court decision in this case rested only on a state-law ground that was materially distinct from, and less protective than, the federal standard governing Ms. Williams' Sixth Amendment claim. Therefore, the state decision did not adjudicate the merits of that claim.

The state-law standard that the state court applied here (Section 1089) only looks to whether a state judge abuses his or her discretion in discharging a deliberating juror based on evidence in the record that the juror was unable to perform as a juror.[89] In contrast, the federal standard requires reversal if a trial judge dismisses a deliberating juror where there is a reasonable possibility that the impetus for the discharge stems from the juror's views on the merits of the case.[90] Because the California Supreme Court has explicitly declined to enforce this distinct (more protective) federal standard, and because the state court opinion here ignored it, it would be illogical to conclude that adjudicating the distinct and less protective state standard somehow adjudicated Ms. Williams' Sixth Amendment claim.

So said the panel below. The panel assumed that *Richter* extends to reasoned opinions, and applying this Court's unanimous opinion in *Richter*, found

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[89] PA 103a.

[90] PA 37a-39a.

Richter's adjudication-on-the-merits presumption overcome, under the unique facts of this case.

Ms. Williams squarely asserted a Sixth Amendment claim in her state appellate briefs on direct appeal. But the State's opposing brief ducked the constitutional issue by discussing her claim purely in state statutory terms. The state appellate court followed suit and affirmed Ms. Williams' conviction on a purely statutory ground.

Following this Court's precedent, the panel below correctly reviewed the state appellate court's citations for the possibility of an indirect adjudication of the Sixth Amendment right. None of the cited state-court opinions, however, disposed of her Sixth-Amendment-based challenge to the discharge of a holdout juror.

Affirming the decision below will not open the floodgates to *de novo* review of state court convictions. Nor would affirmance hurt the California courts. A ruling for Ms. Williams would simply hold either that: (1) *Richter*'s presumption only applies to *unexplained* orders, which takes this case outside of *Richter*; or (2) under the rare circumstances where a petitioner like Ms. Williams can overcome *Richter*'s presumption, the federalism principles AEDPA seeks to preserve through § 2254(d) deference are not at play where the "more likely" explanation for the state court's *reasoned* opinion's silence is that the state court merely overlooked a fairly presented federal claim.

ARGUMENT

A. The question here is how to determine whether a state has adjudicated the merits of a fairly presented federal claim when the state court's *reasoned* opinion speaks exclusively in terms of state, rather than federal, law.

The issue presented here falls somewhere between the two categories represented by (1) *Richter* on the one hand, and (2) the *Wiggins-Rompilla-Porter* and *Cone* line of decisions on the other hand.

B. The answer to this question is not fully provided by *Richter*'s rebuttable presumption, which is a blunt instrument that is necessary only when faced with an *unexplained* state court decision.

Richter's presumption only applies to summary orders, not orders accompanied by an opinion; so this case arguably falls outside *Richter*. The question *Richter* addressed was narrow: "whether § 2254(d) applies when a state court's order is *unaccompanied by an opinion*."[91] And such were the facts of *Richter* – the California Supreme Court denied relief in a one-sentence order. *Richter* is therefore limited, by its own terms, to summary state court dispositions. Thus, the presumption arguably has no place here where the question is whether the state court adjudicated the

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[91] 131 S. Ct. at 784 (emphasis added).

claim at all, particularly when the state court has provided indications that it did not, in an opinion that addressed other claims but not the federal one at issue.

But even if *Richter*'s presumption is extended to apply to *reasoned* opinions, as the Ninth Circuit assumed here, the presumption is rebutted as the Ninth Circuit found from a close analysis of the actual content of the state court's reasoned opinion.

C. The determination of whether a *reasoned* state court decision (like the one here) adjudicated a federal claim on the merits is best (i.e., most accurately) made by referring to the state court opinion's content for clues.

1. That is how this Court has analyzed the issue in the analogous contexts illustrated in *Wiggins*, *Rompilla*, *Porter*, and *Cone*.

In 2003, in *Wiggins v. Smith*,[92] this Court found the state court's application of *Strickland*'s two-prong test to be factually and legally unreasonable in assuming that defense counsel adequately investigated mitigating evidence in a capital case.[93] Thus, this Court found that it was not constrained by § 2254(d)

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[92] 539 U.S. 510 (2003).

[93] *Id.* at 528-29 (discussing *Strickland v. Washington*, 466 U.S. 668 (1984)).

and determined "*de novo*" that defense counsel failed to reach beyond readily available records in investigating Wiggins' background.[94]

Similarly, in 2005, in *Rompilla v. Beard*,[95] this Court citing *Wiggins*, again employed *de novo* review in an AEDPA case to one component of a federal claim that the state court opinion did not reach: "Because the state courts found [defense counsel's] representation adequate, they never reached the issue of prejudice, . . . and so we examine this element of the *Strickland* claim *de novo*."[96]

In 2009, in *Porter v. McCollum*,[97] a state court again considered an ineffective-assistance-of-counsel claim, and found that claim "meritless."[98] The state court ruled only that Porter suffered no prejudice.[99] In unanimously reversing the Eleventh Circuit's denial of habeas relief, this Court, in *Porter*, applied deferential review to the state court's resolution of *Strickland*'s adjudicated "prejudice" prong.[100] But consistent with *Wiggins* and *Rompilla*, *Porter* held that "[b]ecause the state court did not decide whether

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[94] *Id.* at 531.

[95] 545 U.S. 374, 390 (2005).

[96] *Id.* at 390.

[97] 130 S. Ct. 447, 452 (2009) (per curiam).

[98] *Porter v. Crosby*, 840 So. 2d 981, 985 (Fla. 2003).

[99] *Id.* at 985-86.

[100] *See Porter*, 130 S. Ct. at 453-55.

Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*."[101]

Finally, in *Cone*, "[b]ecause the Tennessee courts did not reach the merits of Cone's *Brady* claim" and instead rejected that claim on procedural default grounds, this Court held under those circumstances that "federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.' 28 U.S.C. § 2254(d). Instead, the claim is reviewed *de novo*."[102]

In *Wiggins*, *Rompilla*, and *Porter*, this Court determined that AEDPA deference does not apply to the unadjudicated portion of a two-prong federal claim. Therefore, it would make little sense for AEDPA deference to apply to a completely unadjudicated federal claim. Moreover, since *Cone* held that a completely unadjudicated claim is entitled to *de novo* review, this Court should find *Cone*'s rule applies in this analogous situation where the "more likely" explanation is that the state appellate court overlooked Ms. Williams' federal claim.

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[101] *Id.* at 452.

[102] *Id.* at 472.

2. Further, this Court's mode of analysis in *Early v. Packer*[103] shows that a determination of whether a *reasoned* opinion adjudicates a federal claim involves analysis of that reasoned opinion's content.

Early's mode of analysis can be synthesized into the following question and answer: *Is the state-law standard used in the state's reasoned opinion on par with, or more protective than, the applicable federal standard?* If so, the state court's reasoned opinion can be said to have indirectly adjudicated the federal claim.

In *Early*, this Court recognized that a state court may adjudicate the merits of a constitutional claim without citing federal precedent, and such a decision would be entitled to AEDPA deference. The federal claim in *Early* was that an instruction to a deadlocked jury was coercive and thus violated Early's Sixth Amendment jury-trial right. The state appellate decision did not mention federal law, but instead found the instruction proper under the California Supreme Court decision of *People v. Gainer*,[104] which "impose[s] even *greater* restrictions for the avoidance of potentially coercive jury instructions"[105] than the federal constitutional standard.[106]

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[103] 537 U.S. at 8.

[104] 566 P.2d 997, 1006 (Cal. 1977).

[105] *Early*, 537 U.S. at 8.

[106] *See Gainer*, 566 P.2d at 1000-06.

Because *Gainer* provided *greater* protection than the federal standard, *Early* found that the less-protective federal right had been adjudicated. Without doubt, *Early* did not apply a presumption to the state court's reasoned opinion; instead, *Early* analyzed the reasoned opinion's content.

3. And that is also how the lower federal courts have analyzed the issue since § 2254(d)'s "adjudicated on the merits" requirement became a consideration in federal habeas cases.

Like this Court did in *Early*, the federal courts of appeals have developed a set of logical, easily administrable criteria for determining whether a state court that has been fairly presented with a federal claim and renders a *reasoned* opinion that analyzes the issue exclusively in state-law terms should nevertheless be deemed an "adjudication on the merits" of the federal constitutional claim. Those overlapping criteria include:

(1) Whether the state law standard used in the opinion is on par with, or more protective than, the applicable federal standard.[107]

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[107] *See Early*, 537 U.S. at 8 (giving deference where the state standard provided *more* protection than the federal standard). *Cf. Williams v. Runnels*, 432 F.3d 1102, 1104-05 (9th Cir. 2006) (reviewing *de novo* where the state court applied a *less* rigorous state-law standard to a *Batson v. Kentucky* claim).

(2) Whether the opinion failed to "mention" the relevant federal claim (much less adjudicate the merits) in its disposition.[108]

(3) Whether the opinion's analysis of the state claim covers "nearly identical" concerns as the federal claim.[109]

(4) Whether the opinion's analysis is similar to the requisite constitutional analysis.[110]

(5) Whether there is any indication that the state court considered the federal claim.[111]

(6) Whether the opinion misconstrued the federal claim and thus adjudicated a different claim, but not the right claim.[112]

(7) Whether the opinion discusses the issue at length under a distinct and less protective state law standard while not mentioning the federal standard at all.

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[108] *See, e.g., Holloway v. Horn*, 355 F.3d 707, 718-19 (3d Cir. 2004).

[109] *Id.* at 970.

[110] *See, e.g., Filliaggi v. Bagley*, 445 F.3d 851, 854 (6th Cir. 2006).

[111] *See, e.g., Billings v. Polk*, 441 F.3d 238, 252 (4th Cir. 2006).

[112] *See, e.g., Canaan v. McBride*, 395 F.3d 376, 381-83 (7th Cir. 2005); *Davis v. Secretary, Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam).

(8) Whether the opinion addresses issues raised by the prisoner's brief, except a federal claim.[113]

(9) Whether the opinion suggests reliance upon procedural grounds rather than a determination on the merits.[114]

This mode of reasoned analysis works well when construing *reasoned* state court opinions.

4. This Court's decision in *Cone v. Bell* and appellate court decisions broadly hold that when a state court issues a reasoned opinion that completely fails to address a federal claim, federal habeas courts review that claim *de novo*.

Here, applying the mode of analysis used in *Early* and most federal courts of appeals, the panel below found that the state appellate "court simply failed to decide the [federal] claim without explanation."[115] As this Court stated in *Cone v. Bell*, in 2009, when the "[state] courts did not reach the merits of [the petitioner's constitutional] claim, federal habeas review is . . . *de novo*."[116]

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[113] *See, e.g.*, *Ellsworth v. Warden*, 333 F.3d 1, 4 (1st Cir. 2003) (en banc); *Morris v. Burnett*, 319 F.3d 1254, 1267 (10th Cir. 2003); *Duckett v. Mullin*, 306 F.3d 982, 990-91 n.1 (10th Cir. 2002); *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002).

[114] *Norde*, 294 F.3d at 410.

[115] PA 18a.

[116] 556 U.S. at 472.

The federal appellate court cases construing reasoned state court opinions are more on point than *Cone* (where the federal claim was expressly not reached), and those courts broadly agree that the content of a reasoned opinion should be analyzed (as this Court did in *Early*) to determine whether that opinion adjudicated a fairly presented federal claim.

Indeed, the first case *Richter* cited approvingly, as confirming that AEDPA deference is owed to a state court's summary adjudication, illustrates this federal-appellate-court consensus. In *Chadwick v. Janecka*,[117] then-Judge Alito, writing for the Third Circuit panel, distinguished between "when a claim is rejected without explanation" by a state court, and "when the opinion of a state court reveals that it did not adjudicate a claim."[118] Describing three Third Circuit precedents governing the latter situation, he explained that those earlier opinions "stand for the proposition that, if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply."[119] This divergent treatment between summary dispositions, on the one hand, and reasoned opinions with glaring omissions, on the other, was hardly unique to the Third Circuit. As the representative cases cited below

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[117] 312 F.3d 597 (3d Cir. 2002).

[118] *Id.* at 606.

[119] *Id.*

show, before *Richter*, seven other circuits (including five cited approvingly in *Richter* for their rule as to summary orders)[120] agreed that, if a state court issued a reasoned opinion, it would be deemed to have "adjudicated on the merits" a federal claim only if the opinion gave *some* indication that the court had engaged with that claim.

The federal circuit courts around the country have long held that § 2254(d) deference is not applied to a state court's *reasoned* opinion where that opinion's framing or analysis of the claims reflects no direct or indirect consideration of the relevant *federal* claim.[121] The following examples illustrate the point:

- *Wynne v. Renico*, 606 F.3d 867, 870 (6th Cir. 2010) (reviewing *de novo* Wynne's "federal claim because the state courts addressed only his state law grounds for relief, . . . which means they did not 'adjudicate[ ]' the federal claim 'on the merits'").
- *Cristini v. McKee*, 526 F.3d 888, 899 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 1991 (2009) (reviewing federal prosecutorial misconduct claim *de novo* where the state court resolved the claim purely on state-law grounds, but applying AEDPA deference to harmless error analysis).

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[120] *Richter*, 131 S. Ct. 784.

[121] Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, § 32.2, at pp. 1752-55 & n.7 (6th ed. 2011) (collecting cases).

- *Billings v. Polk*, 441 F.3d 238, 252 (4th Cir. 2006) (Luttig, J.) (reviewing without AEDPA deference where the state court limited its analysis of a Sixth Amendment claim "to the state-law question" and thus "did not adjudicate Billings' Sixth Amendment claim on the merits").

- *Williams v. Runnels*, 432 F.3d 1102, 1104-05 (9th Cir. 2006) (reviewing *de novo* where the state court applied a less rigorous, state-law standard to a *Batson* claim).

- *Canaan v. McBride*, 395 F.3d 376, 381-83 (7th Cir. 2005) (not applying § 2254(d) deference because the state court misconstrued Canaan's federal claim and thus did not adjudicate it).

- *Rodriguez v. Chandler*, 382 F.3d 670, 673 (7th Cir. 2004) (reviewing harmless-error issue, tied to erroneous disqualification of defense counsel, without § 2254(d) deference where the state court never addressed the issue).

- *Holloway v. Horn*, 355 F.3d 707, 718-19 (3d Cir. 2004) (reviewing Holloway's *Batson* claim *de novo* where he raised the claim on direct appeal but the state court "failed to even mention the claim (much less adjudicate the merits) in its disposition").

- *Davis v. Secretary, Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam) (not deferring to the state court where it ignored Davis's claim that his counsel "failed to preserve his *Batson* claim").

- *Ellsworth v. Warden*, 333 F.3d 1, 4 (1st Cir. 2003) (en banc) (although the state court reached Ellsworth's confrontation-clause claim warranting § 2254(d) deference, "[t]he state court did not address Ellsworth's other two claims, and thus our review of those claims is *de novo*").

- *Morris v. Burnett*, 319 F.3d 1254, 1267 (10th Cir. 2003) (reviewing Morris's federal constitutional claim *de novo* because "[w]hen the state court addresses the great bulk of the issues raised by the petitioner's brief in that court but omits to address a particular claim, we have inferred that the claim was not decided 'on the merits' in the state court").

- *Duckett v. Mullin*, 306 F.3d 982, 990-91, n.1 (10th Cir. 2002) (according no deference to one federal claim where the state appellate court "overlooked" it as evidenced by that court's detailed treatment of all other claims).

- *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (conducting *de novo* review where "[t]he [state] court [addressed other claims on the merits but] did not mention Norde's Sixth Amendment claims, and . . . [did not use] any language, general or specific, indicating that those claims were considered and denied on the merits").

The State's position is that if a state court discusses a state-law claim, it should be presumed to have adjudicated any federal-law claim arising from the same underlying facts unless the state expressly invokes a procedural bar. The State's authority for its interpretation of *Richter* is the outlier Eleventh

Circuit case of *Childers v. Floyd*,[122] which held that "unless the state court clearly states that its decision was based solely on a state procedural rule, we will presume that the state court has rendered an adjudication on the merits when the petitioner's claim 'is the same claim rejected' by the state court."[123] But this standard makes *Richter*'s rebuttable presumption irrebuttable (i.e., renders *Richter*'s more-likely-explanation exception surplusage) where a state court issues a reasoned opinion that either ignores or overlooks a federal claim. Essentially the State urges this Court to abandon a fundamental component of this Court's very recent and unanimous opinion in *Richter*.

Although *Richter* cited *Rompilla*,[124] and *Wiggins*,[125] without any expression of disapproval,[126] *Childers* created its own rule, which the *Childers* concurrence and dissent stressed is difficult to square with *Rompilla* and *Wiggins*.[127] And *Childers*' dissent quoted the Seventh Circuit's refusal to "assume that [*Richter*] overruled *sub silentio* its holding in *Wiggins* – a

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[122] *Childers v. Floyd*, 642 F.3d 953 (11th Cir. 2011) (en banc), *petition for cert. filed* (July 6, 2011) (No. 11-42).

[123] *Id.* at 969.

[124] 545 U.S. 374 (2005).

[125] 539 U.S. 510 (2003).

[126] 131 S. Ct. at 789.

[127] *See Childers*, 642 F.3d at 986 (Wilson, J., concurring); *id.* at 988 (Barkett, J., dissenting).

precedent [of recent vintage that is] so important to the daily work of the lower federal courts."[128]

Rather than create an irrebuttable presumption – which would nullify *Richter*'s explicit exception to the presumption – logic dictates that this Court do what it did in *Early* and what most appellate courts do: examine the state court's *reasoned* opinion's contents to determine if the state court adjudicated the federal claim in question.[129]

When dealing with a summary order, *Richter*'s presumption makes perfect sense because "[t]he issuance of *summary* dispositions in many *collateral* attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed."[130]

But here there *was* a reasoned opinion on direct review, where opinions are most needed. Ms. Williams' state appellate court did not issue a summary disposition like *Richter*'s postcard denial; rather, the state appellate court issued a 29-page opinion on direct appeal that analyzed Ms. Williams' juror-discharge claim exclusively under Section 1089, without mentioning her Sixth Amendment claim.

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[128] *Childers*, 642 F.3d at 986 (Barkett, J., dissenting) (quoting *Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011)).

[129] *See supra* pp. 30-35.

[130] *Richter*, 131 S. Ct. at 784 (emphasis added).

The State, which buries *Richter*'s more-likely-explanation standard in a block quote from *Richter*, does not address its plain import.[131] Yet, this standard is the crux of this case.

Where, as here, the state court reduces its reasoning to a written opinion, and where the written opinion indicates that the federal claim was not "adjudicated on the merits," *Richter*'s presumption either does not apply or is overcome.

5. This approach worked in *Early*, has worked for the federal courts of appeals for years, and is not in need of change.

Unlike the irrebuttable presumption advocated by the state, the traditional approach relies on tangible information to reach an informed result – much like the exception to *Richter*'s presumption appears designed to do.

Applying the criteria developed by the courts of appeals, the state court decision in this case rested only on a state-law ground (Section 1089) that is materially distinct from, and less protective than, the federal standard governing Ms. Williams' Sixth Amendment claim. Therefore, the state court's reasoned opinion did not adjudicate the merits of that claim.

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[131] State's Merits Br. at 37.

D. Assuming *Richter*'s presumption applies to reasoned opinions, it is overcome here because the "more likely" explanation for the state appellate court's silence regarding Ms. Williams' Sixth Amendment claim is that the claim was merely overlooked, not adjudicated directly or indirectly.

1. The state appellate court most likely overlooked Ms. Williams' fairly presented Sixth Amendment claim because the State's brief described the dismissal of Juror No. 6 in purely statutory terms.

Ms. Williams' state appellate court briefs squarely raised and fairly presented her Sixth Amendment claim. Her opening brief clearly contends that replacing holdout Juror No. 6 during deliberations violated her "Sixth Amendment right to a unanimous jury, requiring her conviction to be reversed."[132] Her opening brief also cited, and discussed, three federal appellate cases that define the Sixth Amendment standard designed to protect the jury-trial right by prohibiting dismissing jurors based on their views on the merits.[133] In fact, Ms. Williams quoted the protective Sixth Amendment standard at issue here: "[I]f the record evidence discloses *any possibility* that a complaint about a juror's conduct stems from the

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[132] JA 29.

[133] JA 30-31.

juror's view of the sufficiency of the government's evidence, the court must deny the request. . . ."[134] And her opening brief concluded that discharging Juror No. 6 violated her "Sixth Amendment right to a unanimous jury."[135]

Ms. Williams' state appellate reply brief again emphasized that the State ignored "the undeniable conclusion [that] [her] Sixth Amendment right was violated and her conviction must be reversed."[136] And as with her opening brief, Ms. Williams concluded by asking for reversal based on the denial of her Sixth Amendment jury-trial right.[137]

Because the government in Ms. Williams' case chose to *ignore* her Sixth Amendment challenge, it is likely that the state appellate court *overlooked* it. After all, the state appellate court was sure to rely on the State's brief and trust it to accurately describe the claims. But whether the state appellate court *ignored* or *overlooked* Ms. Williams' federal claim, either cause for the omission is more likely than presuming that the state-appellate court's 29-page opinion silently adjudicated Ms. Williams' Sixth Amendment claim on the merits.[138]

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[134] JA 32 n.10.

[135] JA 67 (citing *Brown*, 823 F.2d at 597, and *Perez*, 119 F.3d at 1426-28).

[136] JA 97-98.

[137] JA 108.

[138] PA 24a-25a.

Given both the government's and the state appellate court's obvious omissions, the Ninth Circuit had good reason, under *Richter*, to conclude that Ms. Williams' fairly presented Sixth Amendment claim had been overlooked. First, it noted "the court engaged in an extended discussion of [Ms. Williams'] statutory claim, but made no mention whatsoever of her more fundamental constitutional claim."[139] The Ninth Circuit found this to be a compelling "indication" under *Richter* that the state appellate court "either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision."[140] Second, the panel below respectfully explained its reason for concluding that "some other explanation for the state court's decision 'is more likely.'"[141] That conclusion "comes . . . from common sense and our own experience as sometimes-fallible judges . . . " who in writing long, thorough decisions sometimes neglect to address a particular claim, "because we so focused on the remainder of the opinion that we overlooked the issue we did not mention directly or indirectly."[142] Thus, here "it is most unlikely that the state court methodically analyzed each issue presented on appeal except one, a substantial claim of the violation of a federal constitutional

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[139] PA 24a.

[140] PA 24a.

[141] PA 24a.

[142] PA 25a n.11.

right, which it chose to deny on the merits without saying a word."[143]

2. This Court's precedents support the Ninth Circuit's determination that the state court overlooked or ignored Ms. Williams' Sixth Amendment claim.

Eighteen years before AEDPA, this Court acknowledged that state appellate courts sometimes ignore federal claims. In 1978, in *Smith v. Digmon*,[144] this Court found that the state appellate court's decision ignored a federal claim, despite a contrary finding by the federal district court. Although the federal district court found it "inconceivable" that Smith fairly presented his federal claim in the state appellate court because if he had, that court would "have written to it," and not ignored it,[145] this Court unanimously reversed that finding. By reviewing the briefs Smith filed, this Court conclusively determined that the state court, in fact, "ignored" a properly raised federal claim.[146] Thus, this Court unanimously held "that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to *ignore* in its opinion a

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[143] PA 25a n.11.

[144] 434 U.S. 332 (1978) (per curiam).

[145] *Digmon*, 434 U.S. at 332-33.

[146] *Id.* at 333.

federal constitutional claim" where the petitioner raised it.[147]

Even after AEDPA, in 2005, this Court unanimously found in *Dye v. Hofbauer*,[148] that a Michigan appellate court "chose to ignore" Dye's claim that prosecutorial misconduct violated the federal constitution, not just state law.[149]

As *Digmon* and *Dye* show, the panel opinion below comports with this Court's unanimous habeas authority, acknowledging that state appellate courts sometimes ignore or simply overlook federal claims.

The State argues that Ms. Williams bears fault for failing to draw a sharp dividing line between her Sixth Amendment claim and her statutory claim.[150] But the State's concession that the claim was thoroughly exhausted,[151] and *Dye*,[152] dispose of any argument that Ms. Williams failed to present the

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[147] *Id.* at 333.

[148] *Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam).

[149] *Id.* (quoting *Digmon*, 434 U.S. at 333).

[150] State's Merits Br. 48.

[151] *See* JA 19, Appellee's Br. in the Ninth Circuit Court of Appeals, No. 07-56127 (submitted ECF May 15, 2009) at p. 12, n.6 ("Petitioner exhausted her claim too much by filing a duplicative claim on habeas corpus."). Notably, the over-exhaustion scenario here is the same or analogous to what occurred in *Cone*, which is another reason for this Court to conclude that the panel below's application of *de novo* review was appropriate. *See Cone*, 556 U.S. at 463-71.

[152] 546 U.S. at 4.

federal nature of her claim. In *Dye*, this Court found that a state court brief adequately presents a federal claim when it cites the pertinent federal constitutional provisions and cites federal decisions in support – even if it addresses both the federal and state portions of that argument under the same heading. In *Dye*, it was sufficient that "[t]he state-court brief was clear that the prosecutorial misconduct claim was based, at least in part, on a federal right."[153]

The State's briefing practice – rather than any alleged deficiency in Ms. Williams' brief – most likely led to the state appellate court's oversight. Its discussion of "Applicable Law" began and ended with Section 1089 and California's "abuse of discretion" standard, with no mention of the Sixth Amendment.[154]

This omission from the State's briefs was not an isolated incident. In *People v. Allen*,[155] the two defendants each raised Sixth Amendment challenges to a juror's removal.[156] But inexplicably, the State, arguing the issue purely in statutory terms, ignored the constitutional challenges.[157] The State did the same

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[153] *Dye*, 546 U.S. at 4.

[154] JA 90-92.

[155] 264 P.3d 336, 340 (Cal. 2011).

[156] *See* 264 P.3d at 340; Appellant's Opening Br. in *People v. Allen*, No. S066939, 2005 WL 760027 at *647-650 (Jan. 25, 2005).

[157] Resp't's Br., in *People v. Allen*, No. S066939, http://www.courts.ca.gov/15084.htm, at 238-68 (last visited on May 7, 2012).

thing in *People v. Barnwell*.[158] So the State's complaint about Ms. Williams not invoking the federal constitution in a heading fails under *Dye* and lacks conviction because even when appellants like Allen and Barnwell do so, the State still ignores the federal constitutional claim.

Moreover, this Court's precedent shows that what the State's brief argued in state court matters here. In *Ylst*, this Court had to determine whether a state court's unexplained order rested upon the merits of a federal claim, or upon a procedural bar. Ultimately, *Ylst* reversed the Ninth Circuit's conclusion that the order "constitute[d] a decision on the merits" of the federal claim.[159] To reach this conclusion, *Ylst* invoked the approach used in *Coleman v. Thompson*,[160] which involved looking at the circumstances surrounding the order, "*in particular* the fact that *the State had rested its argument entirely upon* a procedural bar," which "indicated that the basis [of the state court's order] was procedural default."[161] This same analysis applies here. Because the "State had rested its argument entirely upon" Section 1089, it is fair to

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[158] *Compare* Appellant's Opening Br., S055528, 2004 WL 2981918 at *38-55 (raising Sixth Amendment claim) *with* Resp't's Br. 2005 WL 1031414 at *53-76 (ignoring Sixth Amendment claim).

[159] 501 U.S. at 802.

[160] 501 U.S. 722 (1991).

[161] *Ylst*, 501 U.S. at 802 (emphasis added) (citing *Coleman*, 501 U.S. at 740).

conclude that the state appellate court's decision rests exclusively on Section 1089.

3. California law requirements for appellate opinions indicate that the state appellate court likely overlooked the federal claim.[162]

As *Richter* recognized: Only "the California courts or Legislature," not the federal courts, can "alter the State's practices or elaborate more fully on their import."[163] Article VI, § 14 of the California Constitution requires that appellate opinions "shall be in writing with reasons stated."[164] Lengthy analysis is not required; something as concise as, "Defendant's remaining contentions do not merit discussion" will do.[165] But *something* must be said to indicate the court is aware of the remaining issues and has resolved rather than overlooked them.[166]

Despite its need to comply with Article VI, § 14, Ms. Williams' state appellate court opinion, which was fully reasoned on statutory law, failed to include

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[162] *See* 5 Cal. Jur. 3d *Appellate Review* § 706.

[163] *Richter*, 131 S. Ct. at 785.

[164] Cal. Const. art. VI, § 14.

[165] *See Lewis v. Superior Court*, 970 P.2d 872, 893-95 (Cal. 1999).

[166] *People v. Rojas*, 174 Cal. Rptr. 91, 92 (Ct. App. 1981) (per curiam).

even the most cursory or catch-all reference to her Sixth Amendment claim.

In *People v. Kelly*,[167] the California Supreme Court held the Court of Appeal to the requirements of Article VI, § 14, and discussed the purposes and importance of having a written opinion on direct appeal. First, "the written decision . . . provid[es] guidance to the parties and the judiciary in subsequent litigation arising out of the same 'cause'. . . ."[168] Second, requiring a written opinion "promot[es] a careful examination of each case and a result supported by law and reason."[169] Third, allocating judicial resources on direct appeal helps prevent "the unnecessary expenditure of *additional* judicial resources" if the appellate opinion provides at least "the bare information necessary for other courts to recognize which contentions asserted by the defendant have been considered and found lacking in arguable merit and which were considered unreviewable due to an inadequate record."[170] Besides saving *state* judicial resources, requiring "[b]rief written reasons for the appellate court's decision also may assist *federal* courts, which otherwise would be unable to determine whether claims have been exhausted in the state courts."[171] Thus, a California appellate court's opinion

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[167] 146 P.3d 547, 556 (Cal. 2006).

[168] *Kelly*, 146 P.3d at 556.

[169] *Id.*

[170] *Id.*

[171] *Id.* (emphasis added).

on direct appeal "must reflect the contentions [raised] and the reasons that they fail,"[172] regardless of whether the claims are raised pro se or "by counsel."[173]

Because *Kelly* directs state courts to focus their resources on issuing written opinions in a direct appeal (like that of Ms. Williams), a ruling for Ms. Williams would support the proper balance and respect for state procedures.

The State places great emphasis on *Kelly*'s statement that the "author of an opinion must follow his [or her] own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and as to the questions which are worthy of notice at all."[174] But *Kelly*, in finding that the state appellate court can abuse this discretion, elaborated on this standard. The written decision should: (1) describe the contentions; and (2) briefly state why the contention fails, or cite "pertinent case or statutory authority" if that is a "more efficient way of identifying the reason a contention raises no arguable issue, *as long as the citation clearly reveals the basis upon which the Court of Appeal so finds.*"[175]

This emphasized language, which the State replaced with an ellipsis in its quotation from *Kelly*,[176]

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[172] *Id.* at 548.

[173] *Id.* at 555-56.

[174] *Id.* at 559 (quoting *Lewis*, 970 P.2d at 894).

[175] *Id.* at 556 n.4 (emphasis added).

[176] State's Merits Br. at 31.

is critical. Under California law, a citation is sufficient to dispose of a claim only if the cited case actually addressed that claim. Here, as the panel below found, none of the state appellate court's citations implicitly adjudicated Ms. Williams' Sixth Amendment claim because Section 1089 decisions do not dispose of a Sixth Amendment claim.[177]

Here, in its discussion of applicable law, the state appellate court cited four California decisions dealing with Section 1089, not the Sixth Amendment.[178]

The closest the state appellate court came to addressing the Sixth Amendment claim was in the context of defining "bias" and "impartiality" by citing *People v. Nesler*,[179] 16 Cal. 4th 561, 580 (1997),[180] which discussed federal law, but only for general propositions about what the terms "biased" and "impartial" mean.[181] Thus, the state appellate court's *Nesler* citation – for background propositions about bias and impartiality – did not as a matter of California law adjudicate Ms. Williams' Sixth Amendment juror-discharge claim.

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[177] PA 25a-27a.

[178] PA 105a.

[179] 941 P.2d 87, 100 (Cal. 1997).

[180] PA 104a.

[181] *Nesler*, 941 P.2d at 100.

4. Under California law, an adjudication of a Section 1089 claim does not include adjudication of a Sixth Amendment claim as the panel's survey of California cases shows.

The Ninth Circuit panel below correctly found that California courts have not interpreted Section 1089 to be on par with or more protective than the Sixth Amendment standard.[182] In *People v. Collins*, in 1976, the California Supreme Court held that Section 1089's good-cause standard is not a constitutional standard but a rule of judicial economy: "Substitution of an alternate juror upon a showing of good cause is desirable to maintain judicial efficiency. By means of substitution retrial of lengthy cases may be avoided."[183]

Twenty-five years after *Collins*, and while Ms. Williams was pursuing direct appeal, the California Supreme Court held, in *People v. Cleveland*, that a trial court abused its discretion under Section 1089 by discharging a juror without a sufficient evidentiary record of his refusal to deliberate.[184] But the *Cleveland* majority analyzed this issue by applying Section 1089's abuse-of-discretion framework, without resort to a constitutional standard.[185]

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[182] PA 26a-27a.

[183] 552 P.2d 742, 745 (Cal. 1976).

[184] 21 P.3d at 1238.

[185] *Id.*

In fact, although *Cleveland* identified and quoted the federal safeguard,[186] *Cleveland* then explicitly *declined to adopt* the federal-appellate-court standard "that restricts a court's authority to inquire into whether a juror is unable or unwilling to deliberate and that precludes dismissal of such a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.'"[187] Instead, *Cleveland* "adhere[d] to established California law authorizing a trial court . . . to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate."[188]

Thus, Section 1089 is distinct from, not on par with, and not more protective than, the federal constitutional rule. The Ninth Circuit was therefore correct in concluding, from a survey of California decisions under Section 1089, that the state appellate court's "determination that the trial court did not abuse its discretion under section 1089 . . . did not resolve [Ms. Williams'] Sixth Amendment claim, even indirectly."[189]

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[186] *Id.* at 1235.

[187] *Id.* at 1236-37 (quoting *Symington*, 195 F.3d at 1087).

[188] *Id.* at 1237.

[189] PA 27a.

5. As applied here, Section 1089 did not indirectly adjudicate Ms. Williams' Sixth Amendment claim, as the panel's opinion shows.

Stating the rules – as applied – next to each other shows that the federal standard can be violated (and was violated here), even though Section 1089 (as applied here) permitted the holdout juror's discharge:

> **Federal standard:** (1) restricts a trial judge's authority to inquire into whether a juror is unable or unwilling to deliberate, and (2) precludes dismissal of a juror mid-deliberations whenever there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case."[190]

> **Section 1089 standard:** as applied in this case, let a trial judge dismiss a known holdout juror for "bias," which the trial judge found was "good cause" (i.e., under Section 1089 the "juror's inability to perform as a juror"), but without consideration or regard for whether the impetus for the juror's dismissal stemmed from that juror's views on the merits of the case.[191]

Citing two reasons, the Ninth Circuit agreed with Ms. Williams' contention that the trial court violated her Sixth Amendment jury-trial right by

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[190] PA 38a n.16 (quoting *Symington*, 195 F.3d at 1087).

[191] PA 103a.

dismissing a juror who was known to be the lone holdout for acquittal: "(1) there was a reasonable possibility that the request for the juror's discharge stemmed from his views of the merits of the case, and (2) the grounds on which the court relied did not amount to 'good cause' to remove a known holdout juror, and thus violated the Sixth Amendment."[192]

After comparing the facts here with those in *Symington*, the panel concluded that, as in *Symington*, "notwithstanding the cause that the trial court believed it possessed to discharge the juror whom it knew to be the one vote for acquittal, it was not justified in acting upon that cause because there was a 'reasonable possibility' that the request for removal was directly connected to the juror's views on the merits."[193] Thus, as in *Brown* and *Symington*, the panel below determined that it could reverse on this basis alone.[194] But the panel also concluded that "the trial court's lack of 'good cause' for removing the known holdout juror provides an independent reason" for concluding that the Sixth Amendment was violated warranting the grant of habeas relief.[195]

The Ninth Circuit acknowledged that "refusing to follow the law or refusing to deliberate would be 'good cause' for discharging a juror," but noted that "the

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[192] PA 40a.

[193] PA 41a.

[194] PA 41a-42a.

[195] PA 42a.

trial court expressly disclaimed any finding that Juror No. 6 was guilty of either, and the [California] Court of Appeal affirmed that determination."[196] Instead, the trial judge believed that "actual bias" existed, which created good cause under Section 1089 for dismissing Juror No. 6.[197] But as the panel below noted, the trial judge "did not find, however, that Juror No. 6 was 'biased' in any traditional sense of the term. . . ."[198] Instead, the trial judge found Juror No. 6 was "biased" against the prosecution as shown by: his desire to be "very convinced" beyond a reasonable doubt before finding Ms. Williams guilty given the severity of the charge; his discussion of jury nullification; his disagreement with the felony murder rule; and his dishonesty in saying that no juror had discussed the severity of the charge or juror nullification.[199]

The panel analyzed whether the trial judge's bases for discharge constitute "good cause" for removing a known holdout juror for Sixth Amendment purposes.[200] First, the panel began with the trial judge's determination that Juror No. 6 disagreed with the felony murder rule.[201] Such disagreement is not the type of bias that can justify removing a juror for

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[196] PA 42a.

[197] PA 42a-43a.

[198] PA 42a.

[199] PA 43a.

[200] PA 43a-44a.

[201] PA 44a.

good cause mid-deliberations because there is no requirement that jurors agree with the law, so long as they agree to apply it impartially – which Juror No. 6 did here, according to the trial court.[202]

Next, the panel addressed the trial judge's bias findings regarding Juror No. 6's "concern" with the "severity of the charge," which the trial judge erroneously felt meant that Juror No. 6 was applying a higher-than-allowed burden of proof.[203] Juror No. 6 testified, when questioned by the court, "I can remember saying [during the jury deliberations] this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." The panel found that sentiment is not "good cause" for the dismissal of a deliberating juror.[204] Moreover, neither the trial judge nor the state appellate court concluded that Juror No. 6 would not follow the law.[205] Thus, the trial judge's concern did not constitute "good cause" under the Sixth Amendment sufficient to justify removing a holdout juror.[206]

The panel next found that the trial judge's belief that Juror No. 6 was concerned with the severity of the punishment – as opposed to the seriousness of the offense charged – was contrary to the record and thus

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[202] PA 44a.

[203] PA 45a.

[204] PA 46a.

[205] PA 47a.

[206] PA 47a.

failed to amount to good cause for his dismissal.[207] Almost all the jurors agreed that punishment had not been discussed.[208] Thus, the panel concluded that there could not have been good cause to dismiss Juror No. 6 for being concerned about the severity of Ms. Williams' potential sentence.[209]

The panel also determined that the trial judge's concerns about Juror No. 6 being dishonest when questioned by the court about what had been discussed during deliberations is directly contradicted by the record, is manifestly erroneous, and thus cannot provide good cause for his removal.[210]

The panel thus concluded that none of the elements of the trial judge's "bias" determinations regarding Juror No. 6, individually or collectively, served to establish the "good cause" required by the Sixth Amendment to remove a deliberating juror, particularly one who was neither refusing to follow the law nor unwilling to deliberate.[211] The panel listed this as a separate reason, independent of the *Symington* violation, to support its holding that the dismissal of Juror No. 6, a known holdout juror, was unconstitutional.[212]

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[207] PA 48a.

[208] PA 49a.

[209] PA 49a-50a.

[210] PA 50a-51a.

[211] PA 52a.

[212] PA 52a.

Because the state appellate court's Section 1089 ruling never adjudicated the Sixth Amendment claim, the Ninth Circuit's *de novo* review, discussed above, was warranted.

E. The ruling below afforded appropriate respect to the California Court of Appeal, consistent with federalism principles.

The State is wrong in arguing that the Ninth Circuit presumed error by the state court.[213] Instead, before concluding that *de novo* review applied, the Ninth Circuit applied a rigorous analysis: it assumed *Richter* applies even though this case involves a *reasoned* state court opinion, not an *unexplained* denial; it cited and discussed *Richter*'s adjudication-on-the-merits presumption; it explained why reasoned decisions were different from the unexplained denial at issue in *Richter*; it noted the State's inability to identify where the state appellate court addressed the Sixth Amendment claim; it raised various doctrines by which a federal claim may be implicitly adjudicated or by which the failure to adjudicate the claim may be moot; and it ultimately found those doctrines inapplicable.[214] Nothing in the Ninth Circuit's analysis presumed error by the state appellate court.

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[213] State's Merits Br. at 22.

[214] PA 15a-30a.

Epitomizing the disconnect between the Ninth Circuit's reasoning and the State's characterization of that reasoning, the State phrases its question presented as whether AEDPA deference applies "where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim."[215] But the opinion below acknowledged that deference could apply if adjudicating the Section 1089 claim implicitly included adjudicating the Sixth Amendment claim.[216] The panel below further acknowledged that "a state court may adjudicate the merits of a constitutional claim without citing federal precedent, and such a decision would be entitled to AEDPA deference."[217] Thus, assuming Richter's presumption applies to *reasoned* opinions, the panel's reasoning below represented an objectively correct and faithful application of *Richter* and this Court's AEDPA precedents.

The State is also wrong in implying that the Ninth Circuit should not have raised the applicability of AEDPA deference *sua sponte*. It is common for a reviewing court – believing that the parties' briefs set forth an incorrect standard of review – to raise the issue *sua sponte*.[218] Indeed, this Court in *Harrington v. Richter* itself questioned the appropriate standard of review *sua sponte*: "In addition to the question

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[215] State's Merits Br. at i.

[216] PA 25a.

[217] PA 23a.

[218] *See, e.g.*, *Morris*, 319 F.3d at 1267.

presented, parties are directed to brief and argue the following question: Does AEDPA deference apply to a state court's summary disposition of a claim . . . ?"[219]

The State is also wrong to suggest requiring that criminal appellants file a petition for rehearing with the appellate court whenever that court appears to have overlooked a federal claim. Federal habeas contains no such super-exhaustion requirement. Besides, the State's argument fails because the State concedes that Ms. Williams exhausted state remedies.[220]

F. A narrow ruling for Ms. Williams will not burden state courts or open the floodgates to federal habeas relief.

A ruling for Ms. Williams will not have the dire consequences the State and amici predict. The ruling below was narrow, with minimal consequences for future cases.

The State and amici are wrong to suggest that affirmance would permit criminal defendants to game the system by minimally preserving federal constitutional claims to lure state courts into overlooking them. The State's argument is a strawman for at least three reasons.

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[219] 130 S. Ct. 1506, 1506-07 (2010) (Mem.).

[220] *See supra* note 151.

First, Ms. Williams did not engage in such illogical and subversive behavior.[221]

Second, there are no incentives for anyone else to do so, especially since federal habeas relief is unavailable unless a prisoner fairly presents her federal claims to the state courts so they have an opportunity to adjudicate those claims.[222]

Third, because appellate courts generally review "determinations of law under a nondeferential standard, which is independent or *de novo* relief,"[223] a defendant has every incentive to press her state and federal legal claims on direct appeal.

Thus if the State is legitimately concerned that criminal defendants might offer stealth federal claims on direct review in the hopes of leaving open the door to *de novo* federal habeas review, the facts of this case present an easy solution. On direct appeal, the State should address prisoners' federal claims instead of ignoring them. Instead of ignoring the fact that Ms. Williams repeatedly invoked the Sixth Amendment, the State could have addressed the Sixth Amendment claim in its state appellate brief. But here the State chose to ignore Ms. Williams' federal claim.[224] Under these circumstances, affirmance would encourage the

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[221] *See supra* Part D.1.

[222] *See, e.g.*, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

[223] *People v. Cromer*, 15 P.3d 243, 245 (Cal. 2001).

[224] *See supra* Part D.1.

State to aid the California Court of Appeal in its duties under *Kelly* and Article VI, § 14.

Notwithstanding the 31-state amicus brief, the ruling in this case need have no effect beyond California because *Richter*'s presumption is overcome by California Constitution Article VI, § 14 (California's procedural rule requiring reasoned, written appellate decisions). Consistent with the federalism principles underlying AEDPA, federal courts look to "state-law procedural principles" in determining whether a claim was adjudicated on the merits, leaving it to a state's courts or legislatures to "alter the State's practices or elaborate more fully on their import."[225]

Thus, while the State and amici contend that affirmance would penalize state courts for issuing reasoned opinions, that concern is misplaced in California. Article VI, § 14, as interpreted by the California Supreme Court, requires written opinions.[226]

Accordingly, a ruling against Ms. Williams in this case would in no way reduce the workload for California state appellate judges, nor should it affect their opinion-writing practices. And if the citizens of California determine that Article VI, § 14 places too high a burden on their courts, they can amend it. Given the panel's exceptionally narrow, fact-based holding,

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[225] *Richter*, 131 S. Ct. at 785.

[226] *Kelly*, 146 P.3d at 556.

and dutiful application of *Richter* and *Early*,[227] it is difficult to see how this case could possibly handicap the State of California in advocating for AEDPA deference in future cases.

CONCLUSION

This Court should hold either that this case falls outside *Richter*, or that *Richter*'s adjudication-on-the merits presumption is overcome under the circumstances presented here: (1) the State's state-court appellate brief ignored a fairly presented federal claim; and (2) the state appellate court's reasoned decision likely overlooked that federal claim, while analyzing it exclusively under a less protective state statute.

Respectfully submitted,

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[227] PA 23a.

REPLY BRIEF

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DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATUTES

28 U.S.C. § 2254(d) ..... *passim*

REPLY BRIEF

A federal habeas court must apply deferential review under 28 U.S.C. § 2254(d) to claims adjudicated on the merits by a state court. As explained in the State's brief on the merits, a state court has adjudicated the entire claim "on the merits" under § 2254(d) when it has addressed an alleged error on substantive grounds, absent a plain statement to the contrary.

Where a state court has addressed and rejected on substantive grounds the argument that an asserted flaw in the trial requires reversal of a criminal conviction, the most realistic interpretation is that the state court adjudicated the entirety of the claim of error on its merits. State judges know and take seriously their sworn obligation to enforce the federal constitutional rules that govern state trials, and would hardly believe themselves authorized to affirm a conviction as valid under local law in the face of a properly presented argument that relief is nonetheless required by the federal Constitution. This most convincing interpretation of such a state court ruling also serves the purpose of AEDPA's habeas corpus reforms: to limit federal court intrusion into state criminal proceedings. See *Williams (Michael)* v. *Taylor*, 529 U.S. 420, 436 (2000). This interpretation affords proper respect for the state courts' competence and integrity. And it comports most closely with this Court's jurisprudence, which takes a realistically broad view of what qualifies as an adjudication on the merits. See, *e.g.*, *Harrington* v. *Richter*, 131 S. Ct.

770, 784-85 (2011); *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam).

The Ninth Circuit's contrary approach—purportedly applying the *Richter* merits-adjudication presumption, finding it overcome by a dubious negative inference, and concluding that the state court had ignored a federal constitutional claim—finds no support in real life, logic, or the law. Its assumption that the state court either overlooked or ignored a presented federal constitutional argument is an unrealistic interpretation of the state-court opinion. It is also antithetical to the respect due state courts, especially in the AEDPA era.

The Ninth Circuit's "grading papers" approach to state court opinions is incompatible with AEDPA. The effect of the Ninth Circuit's decision would be to require federal habeas courts to focus on the legal standard used by the state courts to determine the adjudication question. That approach illogically conflates the threshold "adjudication" question with the subsequent § 2254(d)(1) deferential-review test. Even worse, it would allow a federal court to grant habeas corpus relief based on its own view of a debatable constitutional-law question—without regard to § 2254(d)'s preclusion of relief except in cases where the state court's ruling runs afoul of the law only as "clearly established" in the strict holdings of this Court. The Ninth Circuit's decision imprudently requires the federal court to take on the uncomfortable role of authoritative expositor on matters of state, rather than federal, law.

As the State shows in its Reply below, respondent Williams's and amicus National Association of Criminal Defense Lawyers' (NACDL) proposed approaches to the "adjudication" question fare no better than the Ninth Circuit's.

ARGUMENT

WILLIAMS'S AND NACDL'S ARGUMENTS EMPHASIZE IRRELEVANT INQUIRIES AND FORMULAIC LANGUAGE

Respondent Williams and amicus NACDL seek to impose upon the state courts various untenable preconditions to the deference that § 2254(d) accords to state merits adjudications of federal claims. They would accept as worthy of deference an adjudication explicitly based solely on state law, provided that the federal habeas court subsequently deems the cited state law to be as protective of the defendant's constitutional right as that federal court's own—perhaps debatable or idiosyncratic—view of the corollary federal rule. In the alternative, they would require the state courts to have explicitly addressed the federal argument using language that the federal court later deems satisfactory. NACDL proffers a third alternative, in which a state court determination would be worthy of deference so long as the state court tacked on a catch-all phrase such as "all other claims are meritless and are rejected." None of these approaches withstands scrutiny.

A. The "Legal Standard" Rule Conflates Different § 2254(d) Inquiries and Would Circumvent § 2254(d) Altogether

Williams and NACDL embrace an "adjudication" rule inherent in the Ninth Circuit's decision that would require a federal habeas court to parse the language of the legal standard the state court applied to the petitioner's claim to determine if it complied with what the federal court believes the federal standard should be. Resp't Br. at 21, 27-28, 49-51, 57; NACDL Br. at 26, 30-33; see PA 25a-27a. But that rule would conflate the threshold "adjudication" question with the subsequent "contrary to" analysis under § 2254(d)(1), an unsupportable construction of the statute. And it would permit a federal habeas court to grant relief, in circumvention of § 2254(d) deferential review, based entirely upon that court's own extensions of Supreme Court precedent beyond the law as "clearly established" only by this Court's square holdings—the touchstone of deferential review under § 2254(d).

1. This approach conflicts with this Court's decision in *Early* v. *Packer*, which explained that "[a]voiding the[] pitfalls" of § 2254(d)(1) "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."[1] 537 U.S. at 8. If a state court need not

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[1] In light of this holding in *Packer*, Williams and NACDL's reliance on dicta in *Chadwick* v. *Janecka*, 312 F.3d 597, 606 (3d Cir. 2002)—describing three pre-*Packer* circuit cases standing

(Continued on following page)

even be aware of this Court's cases for its decision to receive § 2254(d)(1) deference for rulings not "contrary to . . . clearly established Federal law," then it would be illogical to nevertheless require a state court to be aware of, and to explicitly discuss, federal law in order to meet the "adjudication" standard at the threshold of § 2254(d) analysis.

Williams and NACDL misread *Packer*, claiming that it recognized that a state court may *implicitly*

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for the proposition that a misunderstood claim is an unadjudicated claim—is misplaced. See Resp't Br. at 31; NACDL Br. at 13. One of those cases is *Hameen* v. *Delaware*, 212 F.3d 226 (3d Cir. 2000), in which the Third Circuit held that the state court did not "pass on" the defendant's constitutional "argument" because the state court had read one of this Court's cases "too broadly" and thus the Third Circuit could not say that the state court "took into account controlling Supreme Court decisions," which it viewed as "critical" to the adjudication question. *Id.* at 248. *Hameen*'s view conflicts with *Packer*, which rejected the notion that a state court need be aware of this Court's decisions. The second case, *Everett* v. *Beard*, 290 F.3d 500 (3d Cir. 2002), relied on this portion of *Hameen*, so it similarly fails. See *id.* at 507-08. Reliance on the third case, *Appel* v. *Horn*, 250 F.3d 203 (3d Cir. 2001), fails for a different reason. There, the Third Circuit found no merits adjudication where the state court had analyzed a defendant's complaint about his counsel as an ineffective-counsel claim, which is evaluated under *Strickland* v. *Washington*, 466 U.S. 668 (1984), instead of as a constructive-denial-of-counsel claim, which is evaluated under *United States* v. *Cronic*, 466 U.S. 648 (1984). *Appel*, 250 F.3d at 210-11. But a federal habeas court's consideration of whether a state court applied the correct test—*Strickland* as opposed to *Cronic*—is properly addressed under § 2254(d)(1). See, *e.g.*, *Wright* v. *Van Patten*, 552 U.S. 120, 122-26 (2008) (per curiam); *Bell* v. *Cone*, 535 U.S. 685, 694-98 (2002).

adjudicate a constitutional claim—i.e., adjudicate the claim without citing federal law—but only *if* state law provides equal or greater protection than federal law. Resp't Br. at 27-28; NACDL Br. at 33. But *Packer* did not hold that. Rather, in *Packer*, this Court concluded that § 2254(d) applied because the state court had adjudicated the same "jury-coercion claim" presented in the federal petition. *Packer*, 537 U.S. at 8. Then, moving to the subsection (d)(1) analysis, this Court found especially puzzling the circuit court's conclusion that the state court's decision was "contrary to" Supreme Court precedent given that the state court had cited a state case imposing greater protection than federal law. *Id.* Williams and NACDL incorrectly conflate the adjudication determination with *Packer*'s separate determination that the adjudication precluded habeas relief because the state court's ruling was not "contrary to" clearly established law under the § 2254(d)(1) standard of review.

And this is precisely the problem with the assumption underlying the Ninth Circuit's decision and the rule proffered by Williams and NACDL. Under that misguided rule, a federal habeas court may conclude that no adjudication ever took place, and thereby circumvent the application of § 2254(d) altogether, if it believes in its independent judgment that the state-law standard failed to sufficiently protect the challenged constitutional right. Resp't Br. at 21, 27-28, 49-51, 57; NACDL Br. at 26, 30-33. But that analytical framework transforms the "contrary to" analysis under § 2254(d)(1) into the threshold inquiry

of whether there was even a merits adjudication. Examining whether a state court "applie[d] a rule that contradicts the governing law set forth in [this Court's] cases[ ]" is part of the analysis under § 2254(d)(1) for determining whether a state-court's "decision" is "contrary to" this Court's clearly established precedent. *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 405 (2000). Requiring this analysis at the threshold makes the "contrary to" analysis in subsection (d)(1) pointless. The rule advocated by Williams and NACDL swallows it entirely.

2. Worse, their approach would allow a federal habeas court—in the guise of deciding the threshold "adjudication" question—to discard a state court opinion upon concluding that it had evaluated the petitioner's claim under a standard that varies from the law of the circuit, even where the state court ruling was not objectively unreasonable or contrary to the strict holdings of this Court's precedents: the broad boundaries of the deferential rule precluding relief in § 2254(d)(1). *Carey* v. *Musladin*, 549 U.S. 70, 74, 77 (2006); see *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010) (circuit precedent does not constitute "clearly established Federal law," so "any failure to apply [the Sixth Circuit's] decision cannot independently authorize habeas relief under AEDPA").

Even if the standard applied by the state court were relevant at all on the threshold "adjudication" question—a proposition the State disputes, see *ante* at 6-7—it would not make sense to compare that

standard only with the standard reflected in the circuit's own jurisprudence. While state courts are bound by this Court's decisions on federal questions, *Chesapeake & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 220-21 (1931), decisions by lower federal courts on federal questions are not binding on state courts. See, *e.g.*, *People* v. *Bradley*, 460 P.2d 129, 132 (Cal. 1969). So a deviation by the state court from one circuit's own standard would not logically show that the state court had failed to consider the federal constitutional argument. Rather, a federal habeas court would need to consider whether the state standard was contrary to this Court's holdings or, perhaps, whether reasonable jurists could have concluded that the standard applied by the state court protected the federal constitutional right.

Needless to say, also, Williams's approach—permitting a comparison between the state-law standard and the federal standard as interpreted by a circuit court, Resp't Br. at 50-51—would disembowel the § 2254(d) deference that is Congress' centerpiece reform of habeas corpus in AEDPA. Williams should have been denied relief under § 2254(d)(1) because the state court decision to dismiss a biased juror was neither objectively unreasonable nor contrary to the square holdings of this Court's precedent. Rather than properly confining itself to this Court's precedent, the Ninth Circuit found fault with the state court for failing to adopt circuit court precedent. PA 26a.

The Ninth Circuit in essence granted relief because the California Court of Appeal had not applied,

as a federal constitutional rule, language from the Circuit's own precedent in *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999). Indeed, it did so notwithstanding that the Ninth Circuit previously had held that "*Symington* did not establish that such juror dismissals were inappropriate as a matter of constitutional right." *Brewer* v. *Hall*, 378 F.3d 952, 957 (9th Cir. 2004). The Ninth Circuit simultaneously acknowledged and evaded that language by holding *in this case* that the *Symington* test was the federal constitutional standard. PA 38a n.16. However, *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987)—the case upon which the Ninth Circuit relied to change its view of *Symington*, PA 38a n.16—focused on a federal criminal defendant's right to a *unanimous* jury, *Brown*, 823 F.2d at 595-96, a right this Court has held is not applicable to criminal defendants in state trials. See *Apodaca* v. *Oregon*, 406 U.S. 404 (1972); *Johnson* v. *Louisiana*, 406 U.S. 356 (1972); accord *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3035-36 n.14 (2010). More fundamentally, all of the Ninth Circuit's analysis proceeded without regard to whether the purported *Symington* rule had been "clearly established" by this Court, the measure for deference set out in § 2254(d). See *Howes* v. *Fields*, 132 S. Ct. 1181, 1187 (2012); *Musladin*, 549 U.S. at 74; *Terry Williams*, 529 U.S. at 412.

Moreover, as ably shown in the State of Illinois's amici curiae brief, Br. of Ill. et al. at 8-9, asking federal courts to parse state court opinions and, based on that parsing, expound on state law for the purpose

of comparing its view of state law with the federal court's own understanding of federal law, is a perilous and imprudent exercise. This case illustrates that point.

Contrary to the Ninth Circuit's conclusion that California has never considered the federal constitutional restraints on a trial court's ability to remove a juror during deliberations, PA 26a, the California Supreme Court has explained that California's test for removing a juror—that a juror may be discharged "if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate[,]" *People* v. *Cleveland*, 21 P.3d 1225, 1237 (Cal. 2001)[2]—is a "heightened standard . . . used by reviewing courts to protect a defendant's fundamental rights to due process and a fair trial, based on the individual votes of an unbiased jury, which are also hallmarks in American jurisprudence." *People* v. *Allen*, 264 P.3d 336, 344 (Cal. 2011) (citing *People* v. *Barnwell*, 162 P.3d 596, 605 (Cal. 2007) (explaining that the "heightened standard" of the demonstrable-reality test "reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury")); *Cleveland*, 21 P.3d at 1239 (Werdegar, J., concurring) (because of "the need for additional protection of an accused's constitutional rights," the test for affirming a trial court's removal of

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[2] *Cleveland* was the opinion the California Supreme Court ordered the state Court of Appeal to apply to Williams's claim. See JA 3.

a juror is the "demonstrable reality" test, which requires a "stronger evidentiary showing than mere substantial evidence"); see *People* v. *Lomax*, 234 P.3d 377, 418-25 (Cal. 2010) (applying the "demonstrable reality" test to a defendant's claim that the trial court's improper removal of a juror violated his constitutional rights to due process, trial by jury, and freedom from cruel and unusual punishment, as guaranteed by the state and federal Constitutions).

Thus, when inquiring into the substantive standard applied by the state Court of Appeal under state-court jurisprudence as a means for determining whether the state had "adjudicated" Williams's federal claim on the merits, Williams and NACDL ask the wrong question. And, in expounding on the standard endorsed by state-court precedents, the Ninth Circuit fell into the common mistake of coming up with the wrong state-law answer.[3] The effect of such a flawed undertaking was even more egregious: it

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[3] Misinterpretation of state law by the Ninth Circuit is not an isolated occurrence. See, *e.g.*, *People* v. *Albillar*, 244 P.3d 1062, 1074-75 (Cal. 2010) (disapproving the Ninth Circuit's interpretation of California's gang-enhancement sentencing statute); *In re Robbins*, 959 P.2d 311, 326 n.15 (Cal. 1998) (noting that the Ninth Circuit had misread a state case regarding counsel's duty to investigate); *People* v. *Santamaria*, 884 P.2d 81, 91-93 (Cal. 1994) (noting the Ninth Circuit's misunderstanding of California law regarding murder). Moreover, when a federal habeas court misunderstands state law, it has "the power to effectively overrule" a state court's subsequent decision that the federal habeas court's interpretation was wrong. *Santamaria*, 884 P.2d at 92.

short-circuited the fundamental deferential-review standard of § 2254(d).

B. To Require State Courts to Explicitly Address a Federal Argument Would Undermine Comity and Disregard the Reality of State-Court Litigation

In the alternative, Williams and NACDL, like the Ninth Circuit, would deign to grant deference to a state court's explained decision, provided the court showed its work by explicitly mentioning the defendant's federal argument. PA 23a-25a; Resp't Br. at 29, 32-33, 40-41; NACDL Br. at 7-10, 12-15.

1. Such a requirement, however, would interfere with the principle of comity reflected in AEDPA specifically and in habeas corpus law generally. For example, California does not require its courts to recite each assertion made by a defendant; instead, it permits its courts to summarily describe the contentions and the reasons they fail. *People* v. *Kelly*, 146 P.3d 547, 556 (Cal. 2006). But, under the Ninth Circuit approach that Williams and NACDL support, a state court would be required to recite the federal constitutional assertion made by a defendant—even though the state's Constitution does not require that level of definition—before the federal court would be required to show deference to the state court's decision. Not only would such a requirement "smack[ ] of a 'grading papers' approach that is outmoded in the post-AEDPA era[,]" *Wright* v. *Sec'y for Dep't of Corr.*, 278 F.3d

1245, 1255 (11th Cir. 2002), but it would contravene this Court's admonition to federal courts that they "have no power to tell state courts how they must write their opinions[,]" *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991). While a particular state-court opinion might not be "a model of clarity," federal habeas corpus is "not a license to penalize a state court for its opinion-writing technique." *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1396 (2012) (Scalia, J., dissenting).

2. The second problem with Williams and NACDL's proposal is that, as applied in this case, it is built on the faulty premise that the state court opinion here failed to mention a factually and legally independent federal claim. The situation presented by this case is *not* one where a state prisoner presented three factually and legally independent claims, but the state court referred only to two of them. Cf. *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (no § 2254(d) deference to Sixth Amendment right-to-be-present and right-to-counsel claims where the state court addressed only a sufficiency-of-the-evidence claim, a prosecutorial-misconduct claim, and a claim that the prosecutor's inquiry into defendant's prior convictions was prejudicial). Rather, in this case, Williams presented to the state court a single claim that a juror was improperly removed, supported by an argument that relied on both state and federal law. JA 25-67. Thus, Williams presented a single, integrated claim, albeit one supported by state and federal law citations.

As did the Ninth Circuit, Williams and NACDL insist that Williams presented two "claims" in the state court because she supported her contention in her state appeal—that the trial judge had prejudicially erred in dismissing Juror No. 6—with citations to state and federal law. See PA 21a-22a; Resp't Br. at 7-9; NACDL Br. at 27-29. But this narrow conception of "claim"—that the source of the law presented in support of an argument can multiply the number of "claims"—is out of place in the context of state-court litigation.

Unlike federal habeas courts, state courts decide both state-law and federal constitutional questions that pertain to any single alleged claim that a reversible error occurred at the trial. There is no good reason to expect—much less to insist—that a state court should serially and explicitly address every point of law presented in support of a claim that error occurred at trial. A federal habeas court's conception of "claim," for purposes of federal-question, exhaustion, and successive-petition restrictions on its power, would be an ill-fitting and artificial construct if imposed on state courts. Rather, when considering a state-court opinion, "claim" should be interpreted in a "commonsense way." See *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011). A state court has adjudicated a single claim, regardless of whether the claim was supported by multiple legal theories. See *NAACP* v. *Am. Family Mut. Ins.*

Co., 978 F.2d 287, 292 (7th Cir. 1992) ("different legal theories . . . do not multiply the number of claims").

Here, the California Court of Appeal concluded that, contrary to Williams's arguments, Juror No. 6 was properly removed for bias so that no error occurred. PA 104a. Thus, it adjudicated Williams's juror-removal claim on the merits. And that merits determination is entitled to deference under § 2254(d).

For this reason, Williams's suggestion that the State is asking for a "presumption," Resp't Br. at 34-35, is incorrect. Because the state court addressed and rejected on substantive grounds Williams's contention that Juror No. 6 was improperly removed for bias, the state court actually adjudicated the entirety of her claim of error on its merits. There is no need for a "presumption."

C. The Absence of "Catch-All Language" of Debatable Utility Is Not a Significant Factor in Reviewing a State-Court Decision for an Adjudication on the Merits

In an argument that strays from what the Ninth Circuit and Williams seem to require, amicus NACDL asserts that the fault for any ambiguity in a state court's opinion lies with the state court, and it suggests that state courts may solve this problem by simply including a statement that "'all other claims are meritless and are rejected[.]'" NACDL Br. at 20-21. Contrary to NACDL's protestation that it would

not require the state court to use "magic words" to ensure later AEDPA deference, NACDL Br. at 21, that is exactly what it is suggesting. Such a superficial requirement would seem to be of doubtful utility.

As this case illustrates, the use of broad or "catch-all" language would seem to have little effect. Here, the California Court of Appeal used broad language when describing Williams's juror-removal claim: "Williams contends the trial court erred by discharging one of the jurors during deliberations." PA 97a. The state court's description of the basic issue has neither state-law nor federal constitutional connotations. And the state court broadly rejected this claim when, in the next sentence, it declared: "This claim is meritless." *Id.* Nevertheless, the Ninth Circuit found this broad language insufficient to encompass the federal-law aspect of Williams's claim.

The Ninth Circuit's rejection of the state court's use of broad language in this case, therefore, illustrates how little effect NACDL's "catch-all phrase" would have. The "legal standard" rule, endorsed by Williams, easily could be said to undercut any catch-all phrase. That is, even if the state court expressly purported to reject the federal argument, a federal habeas court might later determine that the state court really did not do so because, in the federal court's opinion, the state court nonetheless had applied the wrong rule. Because a catch-all phrase would add virtually nothing of substance to an opinion, litigants such as Williams doubtless would argue

that federal courts should view "catch-all" language as merely reflexive and not indicative of an actual adjudication of the federal argument.

NACDL's effort to use one of this Court's "plain statement" cases, *Michigan* v. *Long*, 463 U.S. 1032 (1983), as a justification for requiring state courts to clarify their decisions, see NACDL Br. at 21-23, is misplaced. In *Long*, this Court held that the federal court must presume a state court decided a case on federal law grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," but the state court's imposition of an independent and adequate state ground "is not clear from the face of the opinion. . . ." *Long*, 463 U.S. at 1040-41. NACDL argues that "*Long* resolved ambiguity *in favor of federal-court review*." NACDL Br. at 23. But the analogy is inapt. In *Long*, an independent and adequate state procedural bar would have precluded federal habeas review altogether. *Long*, 463 U.S. at 1038 n.4. That, however, is not the case here. Where a federal habeas court believes the state court relied exclusively on state law, an "adjudication" finding as to the entire claim would not prohibit federal habeas review. Rather, a petitioner would receive review under subsection (d). Thus, contrary to NACDL's suggestion, NACDL Br. at 23, an allegedly "ambiguous" state-court opinion would *not* stand as a barrier to federal review. Moreover, a state prisoner could receive de novo review if, upon conducting review under

§ 2254(d)(1), the federal court found the state court's decision fell within that provision's "contrary to" clause. See *Terry Williams*, 529 U.S. at 406.

D. The Other Arguments Made By Williams and NACDL Are Equally Unpersuasive

In disputing the State's view that the state court adjudicated Williams's juror-removal claim on the merits, Williams and NACDL make a number of other assertions, none of which have merit.

1. Williams mistakenly tries to answer the "adjudication" question by focusing on cases where a state court elected, indisputably, to resolve a claim without reaching the merits of all, or part of, the claim. Thus, she relies on *Cone* v. *Bell*, 556 U.S. 449 (2009), a case where the state court imposed an invalid procedural bar, and on a triumvirate of cases—*Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (per curiam), *Rompilla* v. *Beard*, 545 U.S. 374 (2005), and *Wiggins* v. *Smith*, 539 U.S. 510 (2003)—where the state courts decided the ineffective-assistance-of-counsel claims by resolving one prong of the two-pronged *Strickland* test. Resp't Br. at 24-26. These cases are inapposite.

It is certainly true that, when a state court imposes a procedural bar and declines to reach the merits of the claim, it has not adjudicated the claim on the merits. See, *e.g.*, *Richter*, 131 S. Ct. at 784-85. But the question presented here does not involve any

explicit invocation of a procedural bar by the state court. So, Williams's reliance on *Cone* is puzzling.

Nor do *Porter*, *Rompilla*, and *Wiggins* assist her. In those cases, the state courts appropriately *elected* to engage in only one of two potentially dispositive inquiries—an approach this Court has recommended for disposing of an ineffective-counsel claim. See *Strickland*, 466 U.S. at 697. In that context, the state court's understandable silence as to the other prong does not suggest that the state court erroneously overlooked the other prong. Rather, following this Court's recommended approach, the state court would have believed it had fully adjudicated the claim by resolving one prong of the *Strickland* test adversely to the petitioner; it did not need to reach the other. Thus, the *Wiggins-Rompilla-Porter* situation is different because, in those cases, the federal courts are not criticizing the state courts for intentionally or neglectfully failing to adjudicate a presented claim.

2. In support of their "no adjudication" argument, Williams and NACDL observe that this Court previously has found in the exhaustion context that state courts sometimes ignore claims. Resp't Br. at 41-42 (discussing *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978) (per curiam), and *Dye* v. *Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam)); see NACDL Br. at 11-12. Even if a state court in the rare case might overlook a claim, federal habeas courts should not assume that a state court did so when it came to grips with the state

prisoner's argument that a mistake warranting reversal occurred at trial. See Pet'r Br. at 25-33.

And, contrary to Williams and NACDL's suggestion, the State never argued that petitions for rehearing are somehow required for exhaustion of state court remedies. Cf. Resp't Br. at 58; NACDL Br. at 10-11 n.2. Rather, as the State explained, this state-court remedy exists to forestall the possibility that a claim may simply be overlooked or ignored. Pet'r Br. at 45. So, federal habeas courts need not fear that a petitioner will be left without a remedy if a state court ever does actually overlook or ignore a claim. Rather, Williams's failure to seek that remedy—which is designed to direct the court's attention to a matter which may have been overlooked in the decision—suggests that she never sincerely believed that the California Court of Appeal had overlooked any claim. This conclusion is bolstered by Williams's argument in the Ninth Circuit that § 2254(d) controlled the outcome of this case. AOB 28-29.

Regardless, this Court has intimated that it would not view an "ignored" claim as unadjudicated. In a subsequent discussion of *Digmon*, this Court described the "ignored" claim there as "therefore impliedly rejected[.]" *Castille* v. *Peoples*, 489 U.S. 346, 351 (1989).[4] Seeking to avoid the impact of this Court's

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[4] In light of this Court's statement in *Castille*, the State disputes NACDL's assertion that the State has agreed that review is automatically de novo when a state court has overlooked or ignored a claim. See NACDL Br. at 2.

"impliedly rejected" language in *Castille*, NACDL suggests that it should be limited only to situations "when such treatment is inconsequential, or even beneficial to the claimant." NACDL Br. at 19. But that outcome-driven, selective-application approach is unprincipled. Under NACDL's proposal, a federal habeas court would first have to determine de novo whether the claim has merit. If it has merit, then a federal habeas court would have to pretend that this Court never said what it did in *Castille*. But if it finds the claim to be meritless, then it could acknowledge this Court's statement in *Castille*. Such an arbitrary approach is an untenable method for promoting regularity of decisions.

Finally, NACDL argues that this Court's "implicitly rejected" language in *Clemons* v. *Mississippi*, 494 U.S. 738, 747-48 n.3 (1990), is inapplicable to the adjudication question because *Clemons* involved this Court's refusal to address "arguments." NACDL Br. at 18. But, here, the Ninth Circuit initially described Williams's juror-removal challenge in just such terms. Specifically, the Ninth Circuit wrote: "Before the [California] Court of Appeal, Williams made two *arguments* relevant to *the issue* relevant now before us." PA 20a-21a (emphasis added). Accordingly, the Ninth Circuit acknowledged that Williams had presented a single juror-removal claim, supported by state-law and federal constitutional arguments, to the California Court of Appeal.

* * *

The Ninth Circuit's conclusion that the state court overlooked or ignored a claim is an unrealistic view of the state-court opinion. "This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). A realistic view of the state court's decision, combined with the proper deference to the state courts and the spirit of AEDPA, compel the conclusion that the California Court of Appeal—which denied relief in an explained decision discussing the propriety of the juror's removal—adjudicated Williams's juror-removal claim on the merits. Thus, the Ninth Circuit erred in failing to review the adjudication deferentially under § 2254(d).

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

DEBORAH K. JOHNSON, Acting Warden,
PETITIONER,

v.

TARA SHENEVA WILLIAMS,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF ILLINOIS, ALABAMA, ALASKA, ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MISSISSIPPI, MONTANA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The States have an interest in the orderly implementation of their criminal laws and in the finality of their courts' criminal judgments. Compliance with § 2254(d) serves these important interests.

STATEMENT

In her direct appeal from her murder conviction, respondent argued that the trial court erred in discharging a juror during deliberations on the ground that the juror was "biased against the prosecution." Pet. App. 88a, 96a, 103a. The California Court of Appeal sustained respondent's conviction. That court held that the trial court did not err under California law, which allows the removal of a juror who "upon * * * good cause shown to the court is found to be unable to perform [her] duty." Pet. App. 103a (internal quotations omitted, brackets in original). Observing that "actual bias" is "good cause" to dismiss a juror under California law, the court relied on state and federal constitutional standards to hold that the record supported the trial court's finding of juror bias. Pet. App. 104a. Although the state appellate court's opinion did not expressly address respondent's claim that the juror's discharge violated the Sixth Amendment, respondent did not file a rehearing petition, as California rules contemplate. See Cal. R. Ct. 8.268. The California Supreme Court denied respondent's request for further appellate review. Pet. App. 85a.

After unsuccessfully pursuing her juror-removal claim in a state habeas petition, Pet. App. 79a-84a,

respondent advanced this same claim on federal habeas, and while the district court denied her petition, the Ninth Circuit reversed and granted the writ, Pet. App. 53a, 58a, 67a-70a. As relevant here, the Ninth Circuit declined to apply § 2254(d) deference to the state court's decision on direct appeal, on the theory that the California Court of Appeal must have "overlooked or disregarded" respondent's federal juror-removal claim. Pet. App. 24a. The Ninth Circuit acknowledged this Court's recent holding that § 2254(d) applies even "'when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied,'" but distinguished that decision because here the state court "provided a lengthy, reasoned explanation for its denial of Williams's appeal," and "none of those reasons addressed her Sixth Amendment claim." Pet. App. 23a (quoting *Harrington v. Richter*, 131 S. Ct. 770, 784-785 (2011)).

SUMMARY OF ARGUMENT

Congress enacted AEDPA "to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). To that end, the statute "leaves primary responsibility [for resolving state prisoners' constitutional claims] with the state courts," *Cullen v. Pinholster*, 131 S. Ct. 1388, 1399 (2011) (internal quotation marks omitted), and "demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). The Ninth Circuit's readiness to attribute to the state court carelessness (at best) or bad faith (at worst) is plainly inconsistent with the "vital relation of mutual respect and common purpose existing between

the States and the federal courts," *Williams*, 529 U.S. at 436, which recognizes that "[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution," *Sawyer v. Smith*, 497 U.S. 227, 241 (1990).

Moreover, the Ninth Circuit's approach creates serious practical problems for both federal and state courts. It requires busy federal judges to engage in often complicated, time-consuming, and ultimately non-binding comparisons of state and federal law. And because prisoners are rewarded with *de novo* review if a state court "overlooks" a federal claim, the Ninth Circuit's rule encourages prisoners to obscure their federal claims in state courts, and discourages them from providing state courts an opportunity to correct any mistakes, including through a petition for rehearing. Further, by subjecting a state-court decision to *de novo* review when it provides some explanation, but affording that decision deference when the state court says nothing at all, the Ninth Circuit's rule unfairly penalizes state courts for issuing reasoned decisions.

Finally, the decision below suffers from serious doctrinal failings. To avoid § 2254(d) deference, the Ninth Circuit relied heavily on select language from *Richter*, but the court misread that decision, which squarely holds that § 2254(d) does not "requir[e] a statement of reasons" for a state court's rejection of a federal claim. 131 S. Ct. at 784. And the Ninth Circuit adopted a rule that cannot be reconciled with the structure and purpose of AEDPA, which, unless the

state court has expressly declined to resolve a clearly presented federal claim, presents federal courts with a choice between two options: they must either afford § 2254(d) deference or apply the procedural default doctrine. For all these reasons, the judgment below should be reversed.

ARGUMENT

The question before the Court is what to infer from silence in a state court decision. For several reasons—in addition to those ably presented in petitioner's brief—federal courts must presume from silence that the state court recognized but summarily rejected a criminal defendant's federal claim, not, as the Ninth Circuit held, that the court "overlooked" or "disregarded" it.

1. The Ninth Circuit's rule infers from silence that a state court either intentionally "disregarded" or carelessly "overlooked" a clearly presented federal claim. Pet. App. 24a. More than this, the ruling below assumes that state courts cannot be trusted to correct their own errors, even when such missteps are brought to their attention. This holding threatens the "vital relation of mutual respect and common purpose existing between the States and the federal courts." *Williams*, 529 U.S. at 436. And it disregards the long-held understanding that state courts faithfully vindicate federal constitutional rights.

a. "'[S]tate courts have the solemn responsibility equally with the federal courts' to safeguard constitutional rights." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) (quoting *Steffel v. Thompson*, 415 U.S.

452, 460-461 (1974)); see also *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."); U.S. Const. art. VI (declaring that "all * * * judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution," and that "the Judges in every State shall be bound" by "the supreme Law of the Land"). Accordingly, this Court has long recognized that, as "coequal parts of our national judicial system," state courts "give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer*, 497 U.S. at 241. And the Court has rejected, as "stem[ming] from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights," "the view that [*de novo*] federal habeas corpus review [of state convictions] is necessary to effectuate [constitutional rights]." *Stone*, 428 U.S. at 493 n.35. In short, since long before AEDPA, this Court has been "unwilling to assume * * * a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." *Ibid.*; see also *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (noting *Stone*'s "emphatic reaffirmation * * * of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so").

The Ninth Circuit's assumption that a state court "either overlooked or disregarded" a federal claim, Pet. App. 24a, fails to afford even "[m]inimal respect for the state processes," which necessarily "precludes any

presumption that the state courts will not safeguard federal constitutional rights," *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (emphasis in original). Rather, proper respect for the competence and integrity of state courts compels the opposite assumption—that when a prisoner fairly presents a constitutional challenge to his conviction, and the state court denies relief without expressly declining to consider that claim, the state court faithfully considered and rejected it. Cf. *Visciotti*, 537 U.S. at 24 ("readiness to attribute error is inconsistent with the presumption that state courts know and follow the law").

b. The fundamental distrust of state courts underlying the Ninth Circuit's rule becomes even clearer when one considers that criminal defendants in respondent's position may seek rehearing. Indeed, the rehearing procedure exists precisely to ensure that courts reach and resolve every claim. In California, for example, "[p]etitions for rehearing * * *enabl[e] counsel to direct the attention of the court to matters presented at the argument which may have been overlooked in the decision." *San Francisco v. Pacific Bank*, 26 P. 835, 835 (1891); see also Cal. R. Ct. 8.268. If respondent believed that the California Court of Appeal had overlooked her Sixth Amendment claim, she could (and should) have filed a petition for rehearing. If this effort failed, it would have confirmed that the appellate court considered and rejected her Sixth Amendment claim. And even a failed effort at reconsideration would have opened the door to California Supreme Court review. See Cal. R. Ct. 8.500(c)(2) (party seeking state supreme

court review is bound by "the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing").

The existence of such backstops within state court systems makes the Ninth Circuit's rule even more extreme. The decision below not only improperly infers from silence that state courts "overlooked" or "disregarded" a federal claim in the first instance, but it further presumes that these courts will *refuse* to rectify that error when it is brought to their attention. This approach improperly "denigrates the judges who serve on the state courts," for it takes as its starting point "that they will not enforce the supreme law of the land." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985); see also *Stone*, 428 U.S. at 493 n.35 (rejecting "basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights").

c. Finally, in the extraordinary event that a state court disregards a federal claim and then affirmatively refuses to correct its error, the criminal defendant has recourse in the federal courts even without the Ninth Circuit's rule. This Court is available to correct the state court's oversight on direct appeal. See *Stone*, 428 U.S. at 493 n.35 (dismissing argument that "the oversight jurisdiction of this Court on certiorari is an inadequate safeguard" for state prisoners' constitutional rights). And federal habeas relief remains available if the state court's judgment is

"contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

2. The Ninth Circuit's rule not only upends the long-established presumption that state courts faithfully apply federal law, but it promises a host of practical problems as well.

a. First, as the decision below itself illustrates, the rule requires federal courts to engage in often complex and time-consuming comparisons between state and federal law. As the Ninth Circuit acknowledged, Pet. App. 23a, § 2254(d) does not require a state court to cite (or even be aware of) this Court's governing decisions. See *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). This means that, before concluding that a state court failed to address a federal claim, a federal habeas court must determine whether any state-law claims that the state court *did* decide also resolved the federal question. Thus, the Ninth Circuit here had to decide whether respondent's Sixth Amendment claim was "the same claim rejected on the merits" by the California Court of Appeal, *ibid.*, which required a complicated analysis of a novel issue of California law—whether "a juror discharge * * * that is permissible under [state law] could nonetheless violate the Sixth Amendment." Pet. App. 26a-27a. In the end, the court concluded that the California courts did "not appear to have considered" the issue. Pet. App. 26a. Putting aside whether the Ninth Circuit's analysis of California law was correct

(and it likely was not),[1] it was necessary only because the court was unwilling to give the state court decision "the benefit of the doubt." *Visciotti*, 537 U.S. at 24. If this Court approves the Ninth Circuit's approach, it will compel lower federal courts to devote their scarce resources to a new line of inquiry in federal habeas cases—a detailed comparison between state and federal protections. And this case illustrates how challenging this comparison can be.

Likewise, in *Childers v. Floyd*, 642 F.3d 953 (11th Cir. 2011), the majority and dissent engaged in a lengthy debate over whether a holding that the trial court had not violated a Florida evidentiary rule necessarily resolved a claim under the Sixth Amendment's Confrontation Clause. Compare *id.* at

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[1] *People v. Cleveland*, 21 P. 3d 1225 (Cal. 2001), addressed a prisoner's claim (like respondent's here) that the trial court had violated his "right to a unanimous jury by dismissing a 'holdout' juror." *Id.* at 1230. The state supreme court "agree[d]" with lower federal court decisions holding that, under the Sixth Amendment, "a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence." *Id.* at 1236. The court parted ways with these lower federal court decisions only over the standard trial courts employ when deciding whether to discharge a juror for an alleged failure to deliberate. See *id.* 1236-1237. Thus, the Ninth Circuit's view that *Cleveland* "was not a constitutional decision," Pet. App. 26a, is not the only—or even the best—reading of that case, and other California decisions hold that "[t]he California process for the substitution of jurors * * * preserves the essential features of the jury trial required by the Sixth Amendment." *E.g.*, *People v. Bowers*, 104 Cal. Rptr. 2d 726, 732 (Cal. Ct. App. 2001).

969-971, with *id.* at 989-992 (Barkett, *J.*, dissenting). Similarly, in *Brown v. Bobby*, 656 F.3d 325 (6th Cir. 2011), the majority and dissent disagreed over whether Ohio's speedy-trial protections were sufficiently similar to those under the Sixth Amendment, so that the rejection of a claim under state law would necessarily resolve a federal claim. Compare *id.* at 329-332 (majority op.), with *id.* at 338-339 (Cole, *J.*, dissenting).

Compounding the problem, conclusions by federal courts on the substance of state rights are not binding on state courts. Only the latter "are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (noting this Court's "repeated[]" holdings to that effect). Accordingly, a federal court's determination on an issue of state law "may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless." *Moore v. Sims*, 442 U.S. 415, 428 (1979); see also *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941) ("no matter how seasoned the judgment of [a federal] court may be" on a question of state law, "it cannot escape being a forecast rather than a determination"). This opens the door wide to unfairness in federal habeas proceedings, where, under the Ninth Circuit's rule, whether a petitioner receives *de novo* review turns on a federal court's interpretation of state law that may prove false with the next state court decision.

b. Moreover, the rule encourages state defendants who would prefer that federal, rather than state, courts adjudicate their federal claims to obscure those claims in state court, in the hopes that the latter will

"overlook" them. And the rule discourages these same defendants from affording state courts the opportunity to correct their mistakes, in the event they do "overlook" a federal claim. As explained, respondent could have made the appellate court's alleged failure to resolve her Sixth Amendment claim the subject of a petition for rehearing, but she declined to do so. The Ninth Circuit's rule rewards this decision, and it gives future defendants little incentive either to present their federal claims clearly in state court, or to give state courts a chance to rectify any alleged omissions. This perverse incentive structure is squarely at odds with "[f]ederal-state comity," which requires a state prisoner to "give the state court an opportunity to rule on the merits of h[er] claim" in the first instance, "before asking the federal court to 'correct' a state court's mistake." *Childers*, 642 F.3d at 967; see also *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) ("the States' interest in correcting their own mistakes" should be "respected in all federal habeas cases").

c. The Ninth Circuit's rule also penalizes state courts that provide reasoned opinions. As this Court has recognized, state courts have crowded dockets, and it may not be an effective use of their limited resources to issue an explained opinion in every case. See *Richter*, 131 S. Ct. at 784 (describing California Supreme Court's heavy caseload). Thus, state courts may issue decisions that summarily dispose of all claims or, alternately, provide an explained decision for fewer than all claims. See *Childers*, 642 F.3d at 968 ("State courts with busy dockets may choose to summarily deny claims they deem weak and instead focus on claims requiring

greater thought," or "decide the merits of claims using state law, with which the state courts are more likely familiar."). Under the decision below, however, a state court's summary disposition always receives § 2254(d) deference, while claims omitted from an otherwise fully explained opinion do not. Requiring state courts to issue opinions that expressly address each claim individually may improperly discourage those courts from issuing explained opinions at all. See *Childers*, 642 F.3d at 971 ("Given that the District Court of Appeal's decision would receive deference had it said nothing at all, see *Harrington*, 131 S. Ct. at 784-785, we cannot say that this minor difference gives a federal court license to conduct *de novo* review."). This is not only an unfavorable result in its own right, but it threatens to intrude on opinion-writing practices, which are properly an area of state prerogative. See *Coleman*, 501 U.S. at 739 ("[W]e have no power to tell state courts how they must write their opinions.").

3. Finally, the Ninth Circuit's rule—aside from its basic mistrust of state courts and significant practical problems—rests on a misreading of *Richter* and is inconsistent with the structure and purpose of AEDPA.

a. *Richter* held that, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 784-785. Relying heavily on this language, the Ninth Circuit concluded that the state appellate court's silence regarding respondent's Sixth Amendment claim was "a compelling 'indication'

that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation for its decision." Pet. App. 24a (quoting *Richter*, 131 S. Ct. at 785). The court thus held that "the *Richter* presumption is overcome," justifying *de novo* review. *Ibid.* The Ninth Circuit, however, misunderstood this passage from *Richter* on which it so heavily relied.

The presumption that "may be overcome when there is reason to think some other explanation for the state court's decision is more likely" is that the state court's unexplained decision was *on the merits* rather than on an independent, procedural ground. *Richter*, 131 S. Ct. at 785. The two cases on which *Richter* relies for the foregoing passage make this clear. *Harris v. Reed*, 489 U.S. 255 (1989), held that a state court decision fairly appearing to rest on the merits of the prisoner's claim will not be deemed to rest on an independent and adequate state procedural ground (which would bar federal habeas review) "unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Id.* at 263 (internal quotation marks omitted). And *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), followed suit by holding that where a state court expressly rejects a claim on procedural grounds, a later state court decision silently rejecting that claim is exempt from *Harris*' presumption, for in that instance it is more likely that the later court's silent decision was on the same ground as the earlier court's reasoned one. See *id.* at 803-804.

Thus, the passage from *Richter* on which the Ninth Circuit relied does no more than reaffirm the role of *Ylst* and *Harris* in determining whether a state court's adjudication of a claim is on the merits or on a procedural ground. The question here, however, is not the *reason* for the state court's adverse adjudication of respondent's Sixth Amendment claim, but whether the court adjudicated that claim at all, and nothing in the foregoing passage from *Richter* qualifies the Court's holding "that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" 131 S. Ct. at 785. Contrary to the Ninth Circuit's misreading of language in *Richter*, therefore, the governing rule is that a state court adjudicates a fairly presented federal claim when it silently denies relief on that claim without expressly declining to consider it. Cf. *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (equating state court's silence regarding fairly presented claim with its "implied[ ] reject[ion]"); see also *Webb v. Webb*, 451 U.S. 493, 501 (1981) (recognizing that state courts may "silently resolve[ ]" fairly presented claims); *Angel v. Bullington*, 330 U.S. 183, 190 (1947) (same).

b. The Ninth Circuit's decision is also inconsistent with the architecture and purpose of AEDPA. AEDPA's "basic structure" is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 131 S. Ct. at 787. And its twin pillars are § 2254(b)'s exhaustion requirement (with the attendant doctrine of procedural default) and § 2254(d)'s relitigation bar.

Section 2254(b) provides that "a habeas petitioner challenging a state conviction must first attempt to present his claim in state court." *Richter*, 131 S. Ct. at 787. Accordingly, if a prisoner fails "to give the state courts a full and fair opportunity to resolve federal constitutional claims," *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), or if the state courts reject federal constitutional claims "pursuant to an independent and adequate state procedural rule," *Coleman*, 501 U.S. at 750, federal habeas review of those claims is barred, unless the habeas petitioner can satisfy either the cause-and-prejudice exception or the fundamental-miscarriage-of-justice exception, see *ibid.*

For its part, § 2254(d) "complements the exhaustion requirement and the doctrine of procedural bar." *Richter*, 131 S. Ct. at 787. Just as exhaustion and procedural default promote comity, finality, and federalism by "channel[ing] prisoners' claims first to the state courts," *Pinholster*, 131 S. Ct. at 1398-1399, and giving state courts the first opportunity to resolve federal claims, see *Coleman*, 501 U.S. at 732, § 2254(d) promotes these same interests by "ensur[ing] that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding," *Richter*, 131 S. Ct. at 787.

Thus, courts have correctly recognized that "[t]he concept of an 'adjudication on the merits' is the corollary of the long-held requirement that a state prisoner first exhaust his claims in state court." *Childers*, 642 F.3d at 967. It is a term of art in federal habeas law, implementing a structure that ("[a]ssuming that the independent state procedural bar is adequate to

support the judgment and not excused by a showing of either cause and prejudice or a fundamental miscarriage of justice") "present[s] federal habeas courts with a binary circumstance: [they] either apply AEDPA deference to review a state court's disposition of a federal claim or refuse to review the claim because of a procedural bar properly raised." *Jimenez v. Walker*, 458 F.3d 130, 145 & n.18 (2d Cir. 2006); see also *Childers*, 642 F.3d at 968 ("an 'adjudication on the merits' is best defined as any state court decision that does not rest solely on a state procedural bar"); *Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005) ("An adjudication on the merits is perhaps best understood by stating what it is not: it is not the resolution of a claim on procedural grounds."). This structure leaves no room for the Ninth Circuit's rule, which holds that a claim may be at once fairly presented to a state court (so that it meets the exhaustion requirement) and not rejected by the state court on procedural grounds (so that it survives the procedural default doctrine) yet nevertheless not adjudicated on the merits (so that § 2254(d) does not apply to federal habeas review of that claim).

In short, by failing to afford § 2254(d) deference, the Ninth Circuit "improper[ly] interven[ed] in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system." *Richter*, 131 S. Ct. at 787.

* * *

The Ninth Circuit's rule upsets the longstanding presumption that state courts faithfully apply federal

constitutional law, yields substantial practical problems and a range of perverse incentives, and has serious doctrinal flaws. The proper rule is simple: if a criminal defendant fairly presented a federal claim in state court, that court is presumed to have addressed and rejected that claim unless the court expressly declined to consider it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 11-465

IN THE

Supreme Court of the United States

DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. Its members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal-defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

This case implicates NACDL's mission because a ruling against Respondent Williams would deprive criminal defendants of even one, full, fair opportunity for review of federal constitutional challenges to their convictions or sentences. Federal habeas review is an essential safeguard of the constitutional rights of criminal defendants; to defer to a presumed decision of a state court, absent any indication that the court considered or adjudicated a habeas petitioner's federal claims, would undermine that safeguard when it is most needed.

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[1] Counsel for all parties consented to the filing of this brief. No counsel for a party in this case authored the brief in whole or in part, and nobody, other than *amicus* or its counsel, has made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

I. The parties to this case agree that, if a state court has overlooked or ignored a federal claim properly presented to it, a federal habeas-court's review of that claim must be *de novo*. The question is how the federal court should determine whether the state court has overlooked such a claim. In particular, if the state court issued an opinion that did not mention some federal claim—even as it discussed other claims—should the federal court recognize that the omitted claim was overlooked? Or may the federal court simply presume that the state court resolved that particular claim silently?

II. In such a situation, common sense, confirmed by abundant case law and reinforced by the concern that every habeas petitioner receive at least one full and fair consideration of her federal claims, all point to the same answer: If a state court issues an opinion, but the opinion fails to address a properly presented federal claim, that claim cannot be assumed to have been adjudicated. Accordingly, AEDPA's deferential standard of review in 28 U.S.C. § 2254(d) does not apply.

If a state court, in an opinion, addresses multiple claims raised by the habeas petitioner but omits a single federal claim, it is common sense that the court likely overlooked or ignored that claim. Such a view is in any event more reasonable than the alternative of speculating that the court *silently* resolved that particular claim on the merits even while not according such treatment to other claims. State courts sometimes do, for all sorts of reasons, overlook federal claims, as this Court and state law

itself recognize. Acknowledging that reality is hardly "disrespectful." Rather, ignoring it would be naive.

This realistic approach to state-court opinions, adopted by the unanimous panel below, finds deep support in the precedents of the federal courts of appeals, which broadly followed it for a decade before this Court decided *Harrington* v. *Richter*, 131 S. Ct. 770 (2011). In careful opinions by noted jurists like then-Judge Alito and Judges Luttig and Sutton, the circuit courts treated claims that were properly presented but left unaddressed in state-court opinions as overlooked, not as silently adjudicated on the merits. Those same courts also treated a state court's *summary order* as an adjudication on the merits, triggering AEDPA deference. They saw no conflict between these rules: It makes perfect sense to treat a summary order denying relief as an adjudication on the merits, because there is no reason to treat it as anything else; by contrast, omission of a claim from a written opinion is a red flag. *Richter* approved the circuit courts' rule for summary orders, without disturbing their consensus rule for opinions with omissions. This Court now should similarly approve the latter consensus.

This position is correct not only as a descriptive matter confirmed by precedent (all humans, even judges, make mistakes), but also as a normative matter. By confirming that a state court in issuing an opinion must somehow (even with brief, general language) signal consideration and rejection of a federal claim in order for that claim to receive deferential federal-court review, this Court will advance the sound judicial policy of encouraging clarity by state courts. This Court has recognized the

benefits of placing such a minimal burden of clarity on state courts; doing so here would not break new ground. And the pre-*Richter* consensus in the circuit courts confirms that such a rule neither imposes an appreciable burden nor suffers from practical problems. Rather, resolving ambiguity in a state-court opinion in favor of *de novo* review by the federal habeas court would protect the integrity of the federal habeas framework, ensuring that no prisoner is denied his right to a "first bite at the apple."

III. Finally, the Warden's arguments that a state court's adjudication of a state-law claim, if related to an omitted federal-law claim, somehow also adjudicates the omitted claim are overstated at best, and inapplicable here. As the Warden must admit, the word "claim" has an established meaning in the habeas context: It refers to a particular legal basis for relief under a set of operative facts. That settled definition makes clear that adjudication of a state-law claim does not of necessity dispose of a federal-law claim, even if the claims involve the same set of facts. Nor does the existence of some overlap between the state and federal standards change this conclusion. Only in the limited circumstances in which a State has authoritatively adopted the federal standard, or adopted a state standard that is always more generous than related federal law, might it make practical sense to deem adjudication of the state-law claim to have been a silent adjudication of the federal-law claim. But such circumstances are rare, and they do not exist here. In at least most cases in which a state court issues an opinion, a properly presented federal-law claim should receive some clear resolution. Otherwise, § 2254(d) does not apply, and federal habeas review is *de novo*.

ARGUMENT

I. AEDPA Does Not Restrict Habeas Review of a Properly Presented Federal Claim That the State Courts Overlooked or Ignored.

The only disputed question in this case is *how to determine* whether a state court has overlooked or ignored a federal claim that was properly preserved and presented. For if a state court *does* overlook or ignore such a federal claim, the consequences are undisputed: A federal habeas court must accord that claim *de novo* review.

AEDPA restricts the power of federal courts to grant a petition for a writ of habeas corpus, but only "with respect to any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). The statute thus prescribes deferential review only for a claim that the state court actually reached and resolved. *See, e.g.*, *Cone* v. *Bell*, 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA.").

In most cases when a state court did not "adjudicat[e]" a federal "claim" on the merits, there will be a good reason: The habeas petitioner either did not present the claim to that court, or the State's procedural rules barred the claim's presentation due to an earlier failure to preserve it. And in either case, the federal court generally may not review the claim *at all*, because of the exhaustion requirement and the doctrine barring federal habeas review of procedurally defaulted claims. *See* § 2254(b)(1); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977).

Section 2254(d) "thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Richter*, 131 S. Ct. at 787. If a petitioner fails to preserve or present a federal claim in state court, habeas review of that claim will generally be barred. And if a petitioner does preserve and present his federal claim in state court, the state court will ordinarily adjudicate it on the merits; AEDPA, in turn, will honor that court's "good-faith attempts to honor constitutional rights," by allowing only deferential review by the federal habeas court. *See id.* (internal quotation marks omitted).

Sometimes, however, a petitioner properly presents a federal claim to a state court, yet the state court nonetheless fails to adjudicate it on the merits. While relatively rare, this scenario occurs if, for example, the state court simply misses the claim, or misunderstands its nature or scope, or erroneously believes that it has been procedurally defaulted. Whatever the reason, the habeas petitioner has done all that AEDPA requires of him to ensure that the state courts have "the first opportunity to review this claim," yet the state court has failed to take that opportunity. *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999). The petitioner has received no adjudication of his claim, and there is no merits decision to which a federal court could defer.

When that happens, § 2254(d), by its terms, does not apply; nor would any purpose be served by restricting federal review of the claim. It then falls to the federal habeas court—the first and only court to consider the federal claim's merits—to do so *de novo*.

II. If a State Court Issued an Opinion That Failed To Address a Properly Presented Federal Claim, a Habeas Court Should Not Presume That the Claim Was Nonetheless Adjudicated.

The question, then, is how the federal habeas court should determine whether the state court has actually adjudicated a federal claim on the merits (in which case § 2254(d)'s deferential standard of review governs) or, instead, has overlooked or ignored the claim (in which case review is *de novo*).

The question arises, most obviously, where the state court did not issue any written opinion. This Court confronted that scenario in *Richter*. Agreeing with the longstanding consensus of the federal circuit courts, the Court approved a sensible presumption: "that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 784-85. If all the state court said is that it denied relief, presumably it adjudicated the claim on the merits and determined that no relief was warranted. At least, there is no reason to believe otherwise. *Cf. Ylst* v. *Nunnemaker*, 501 U.S. 797, 803 (1991) ("[M]any formulary orders are not meant to convey *anything* as to the reason for the decision.").

Correspondingly, where the state court *did* choose to issue a written opinion giving its reasons for denying relief, determining whether that court adjudicated the federal claim on the merits ought to be easy: The federal habeas court can simply read the opinion. But what if the opinion made no reference to the particular federal claim at issue, even while addressing the remainder of the claims? That is the scenario implicated by this case, and such

an omission raises serious doubts about whether the federal claim was, in fact, adjudicated.

Under such conditions, the more realistic interpretation of the record is that the state court did not adjudicate that particular claim—a common-sense inference reinforced by decisions of this Court. The federal courts of appeal have long widely recognized as much, and there is no reason to believe that this court in *Richter* silently rejected that consensus while agreeing with those same courts' treatment of summary orders. To adopt this interpretation would also be the most consistent with judicial policy. By contrast, to presume that state courts adjudicated all claims that were presented to them—despite direct evidence to the contrary—would be to adopt a legal fiction that will deprive petitioners of even a single opportunity for full review of potentially meritorious federal claims.

A. When a state-court opinion makes no mention of a particular claim, either specifically or generally, the likely reason is that the court overlooked it.

In determining whether a state court adjudicated a federal claim—and thus whether a warden may restrict a federal habeas court's review to the deferential grounds in § 2254(d)—the question is whether the possibility of an actual adjudication is "more likely" than the alternative. *Richter*, 131 S. Ct. at 785. (As the party seeking the benefit of § 2254(d), a warden of course bears the burden of persuasion, even though the habeas petitioner bears the ultimate burden of establishing his claim. *See, e.g.*, *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 91-92 (2008).) If a federal court cannot fairly

answer that question in the affirmative, then § 2254(d) cannot apply, because an "adjudicat[ion] on the merits" of the federal "claim" is a condition precedent to application of that provision's deferential standard of review.

1. Where the state court issued a written opinion explaining its reasons for denying relief on various claims, but omitted to refer to one particular claim that the petitioner properly raised, the most logical inference is that the state court overlooked or ignored that claim. After all, when a court writes an opinion, it ordinarily mentions—at least in general or cursory terms—the claims that it is resolving. Omission of a claim in such circumstances raises a red flag, and leaves a warden no credible ground for establishing that it is "more likely" that the state court actually resolved that lone claim *sub silentio*.

This inference is common sense. For example, if an employee submits to his boss a request for a raise, a larger office, and an extra week of vacation, and the boss responds, "Your salary will stay the same, and no other offices are available," any observer would suspect that the request for additional vacation had been left unresolved, whether by inadvertence or design. The same is true when a criminal defendant seeks relief under, for example, state law, the Fourth Amendment, and the Fourteenth Amendment's Due Process Clause, and the state court writes an opinion referring to only two of the three claims.

Justice Ginsburg, joined by Justices Breyer and Souter, has explained this very point: If a "state court, in disposing of the case, left one or more of the issues unaddressed," there is "no warrant ... for an assumption that the state court, *sub silentio*,

considered the issue and resolved it on the merits," because "[n]othing in the record would discount the possibility that the issue was simply overlooked." *Bell* v. *Cone*, 543 U.S. 447, 460-61 (2005) (Ginsburg, J., concurring). "A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point." *Id.*

2. Here, the Warden seeks to "arbitrarily" impose on federal habeas courts precisely that "assumption" that has "no warrant." *Id.* She relies on the policy argument that, because state courts are *obligated* to apply federal law and resolve federal claims, they should always be *presumed* to have done so. (Warden Br. 25-27.) Indeed, any contrary finding would, she asserts, be "untoward" and "ill-behoov[e] comity." (*Id.* 43-44.)

Yet AEDPA itself contemplates that state courts will, sometimes, err. *See* § 2254. And just as they sometimes err in *resolving* federal claims, so they also sometimes err in *not resolving* federal claims. Indeed, the States themselves recognize this, by widely granting their courts the discretion, through petitions for rehearing, to address matters that their opinions overlooked. (*See* Warden Br. 45-46.[2])

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[2] The Warden, in collecting authority on petitions for rehearing, may mean to suggest that a habeas petitioner should be obligated to seek rehearing from a state court that has overlooked his properly presented federal claim, or else § 2254(d) somehow applies. But the petitioner's obligation is simply to exhaust pursuant to § 2254(b)(1), that is, to fairly present his claim so as to give a state court an "opportunity to correct the constitutional violation in the first instance."

This Court too has repeatedly recognized that reality. In *Dye* v. *Hofbauer*, 546 U.S. 1 (2005) (per curiam), the Court summarily reversed the Sixth Circuit's determination that a habeas petitioner had not preserved his federal claim in state court. *Id.* at 5. The circuit court had so inferred because the state-court opinion "made no mention of a federal claim." *Id.* at 3. But, as this Court reasoned: "Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it." *Id.* Quoting an earlier precedent recognizing the same point, the Court found it "too obvious to merit extended discussion" that the state court may have simply "cho[sen] to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief." *Id.* (quoting *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978) (per curiam)).

(continued...)

O'Sullivan, 526 U.S. at 845. This Court accordingly has "never interpreted the exhaustion requirement" to "requir[e] a state prisoner to invoke *any possible* avenue of state court review." *Id.* at 844. In particular, "[h]abeas petitioners are not required to ask for a rehearing of the state court's ruling in order to fulfill the exhaustion requirement." *Wilson* v. *Battles*, 302 F.3d 745, 748 (7th Cir. 2002). Moreover, denial of rehearing is not a decision on the merits and thus would say nothing about whether a state court overlooked or ignored a federal claim. *See, e.g.*, *Norde* v. *Keane*, 294 F.3d 401, 410-11 (2d Cir. 2002) (holding that denial of petition for rehearing was "not a factor in determining whether his claims were adjudicated on the merits"); *see also Alpha/Omega Ins. Servs., Inc.* v. *Prudential Ins. Co.*, 272 F.3d 276, 281 (5th Cir. 2001) (denial "does not amount to a decision on the merits."); Cal. R. Ct. 8.268 ("[A] reviewing court *may* order rehearing.") (emphasis added).

Just as a state court's failure to address a claim hardly warrants assuming that the petitioner failed to raise the claim, so too does the existence of a petitioner's properly raised claim hardly warrant assuming that the state court adjudicated the claim even though failing to address it. In either case, the petitioner may have raised the claim, and the state court may have overlooked it.

Thus, the Warden is at odds with experience and authority in seeking to foist upon the federal courts, through an automatic and apparently irrebuttable presumption, the fiction that state courts *never* overlook or ignore properly presented federal claims. Rather, federal courts must be able to examine the full state-court record and, where it indicates that the state courts overlooked a particular federal claim, to treat that claim accordingly.

B. The federal circuit courts accordingly have long refused to presume that claims omitted from state-court opinions were silently adjudicated.

Consistent with the logic and precedent above, the unanimous Ninth Circuit panel here refused, in light of the state court's failure in its opinion to mention Respondent's Sixth Amendment claim, to "assum[e]" that the court "necessarily decided" it. *Bell*, 543 U.S. at 460-61 (Ginsburg, J., concurring). In so doing, that panel was merely walking a path well-trod by numerous other circuit courts. For a decade before *Richter*, the circuit courts widely held that, while a state court's summary order is properly deemed to be a merits adjudication, the *opposite* inference is appropriate if a state court did issue an opinion but failed therein to address a particular federal claim.

Most notably, in *Chadwick* v. *Janecka*, 312 F.3d 597 (3d Cir. 2002), then-Judge Alito, writing for a unanimous panel, distinguished between two situations: "when a claim is rejected without explanation" by a state court, versus "when the opinion of a state court reveals that it did not adjudicate a claim." *Id.* at 606. He recognized the authority of three Third Circuit precedents addressing the latter situation and "stand[ing] for the proposition that, if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply." *Id.* At the same time, however, *Chadwick* granted AEDPA deference to the state court's summary order denying relief "without explanation," *id.*; and *Richter* cited *Chadwick* approvingly as its lead case on that point. *See* 131 S. Ct. at 784.

Likewise, in *Billings* v. *Polk*, 441 F.3d 238 (4th Cir. 2006), Judge Luttig explained for a unanimous panel that the petitioner had "raised his Sixth Amendment claim before the North Carolina Supreme Court" but that court had "limited its analysis to the state-law question." *Id.* at 252. Given that there was accordingly "no indication that [the state court] considered" the federal claim, the Fourth Circuit reviewed it "without the deference otherwise mandated by AEDPA." *Id.* Yet the Fourth Circuit also agreed that "a summary state court decision ... is an 'adjudication' of the claim for purposes of § 2254(d)." *Bell* v. *Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (en banc). And *Richter* cited *Bell* approvingly, too. *See* 131 S. Ct. at 784.

In the Sixth Circuit, the rule regarding omissions was similarly well established. In *Wynne* v. *Renico*, 606 F.3d 867 (6th Cir. 2010), for example, Judge Sutton reasoned for a unanimous panel that "fresh review" was owed to a petitioner's federal claim when "the state courts addressed only his state law grounds for relief, which means they did not 'adjudicate' the federal claim 'on the merits.'" *Id.* at 870. Judge Sutton had employed the same analysis in an earlier case, *Lyell* v. *Renico*, 470 F.3d 1177 (6th Cir. 2006), in which the petitioner had "presented federal polling and fair-trial claims," along with "state-law challenges," but the state court had "addressed [his] claims only in state-law terms in its decision." *Id.* at 1182; *see also Danner* v. *Motley*, 448 F.3d 372, 376 (6th Cir. 2006) (holding that AEDPA deference did not apply where state-court opinion gave no "indication" or "evidence" that it considered federal claim). At the same time, though, the Sixth Circuit as well granted AEDPA deference to summary orders by state courts, as in *Harris* v. *Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), which *Richter* cited approvingly, *see* 131 S. Ct. at 784.

The Tenth Circuit adopted the same reasoning: "When the state court addresses the great bulk of the issues raised by the petitioner's brief in that court but omits to address a particular claim, we have inferred that the claim was not decided 'on the merits' in the state court." *Morris* v. *Burnett*, 319 F.3d 1254, 1267 (10th Cir. 2003); *see also Duckett* v. *Mullin*, 306 F.3d 982, 990 (10th Cir. 2002) (according no deference when state court "obviously overlooked this particular claim"). And the Tenth Circuit's contrary inference as to summary orders was

approved in *Richter*. *See* 131 S. Ct. at 784 (citing *Aycox* v. *Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999)).

Other circuits were in accord; none imposed a mechanical presumption that any properly presented federal claim must necessarily have been decided, even if the state-court opinion said nothing about it. *See, e.g.*, *Canaan* v. *McBride*, 395 F.3d 376, 382 (7th Cir. 2005) ("When a state court is silent with respect to a habeas corpus petitioner's claim, that claim has not been 'adjudicated on the merits.'"); *Brown* v. *Luebbers*, 371 F.3d 458, 460-61 (8th Cir. 2004) (en banc) (determining whether federal claim has been adjudicated on merits requires federal court to "look at what a state court has said, case by case" to ensure that claim was in fact "considered and rejected"); *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (distinguishing circuit precedent regarding summary orders, *Sellan* v. *Kuhlman*, 261 F.3d 303 (2d Cir. 2001), where state-court opinion had no language "indicating that [Sixth Amendment] claims were considered and denied on the merits"); *Fortini* v. *Murphy*, 257 F.3d 39, 43, 47 (1st Cir. 2001) (holding that federal claim had not been adjudicated on the merits when "the federal claim was never addressed by the state courts").

Thus, the same circuits that recognized that state-court summary orders denying relief are entitled to AEDPA deference, *see Richter*, 131 S. Ct. at 784, simultaneously recognized that state-court opinions with glaring omissions are not so entitled, because such omissions signal a failure to consider the claim. The Warden is reduced to asserting that these cases, to the extent she acknowledges them, were all wrongly decided. (Warden Br. 44-45.) And the *Amici*

Curiae States simply ignore them. For the reasons explained above, however, the circuit courts were not wrong, and the panel here rightly followed their lead.

C. *Richter* did nothing to disturb the circuit courts' consensus regarding omitted claims.

This Court's recent decision in *Richter* dealt exclusively with the problem posed by summary orders. It would be most peculiar if, in adopting the consensus of the federal circuit courts as to that problem, the Court somehow silently repudiated those same courts' consensus approach to the problem of omitted claims. *Richter* does no such thing, in either its holding or its rationale. Nor does the other authority that the Warden cites to contest the longstanding inference that a claim omitted from an opinion has likely been overlooked rather than adjudicated for purposes of AEDPA.

1. The question that the Court considered in *Richter*—on its own initiative—was narrow and carefully defined: "whether § 2254(d) applies when a state court's order is *unaccompanied by an opinion*." 131 S. Ct. at 784 (emphasis added). The question arose because the California Supreme Court had denied relief "in a one-sentence summary order." *Id.* at 783. In that context, an evidentiary rule one way or the other was needed, and there was no reason to suspect that the state court did not actually adjudicate the claims before it denied relief. To return to an earlier hypothetical, an employer who responds to his employee's request for three special dispensations with a terse "No!" is presumably denying all three. Accordingly, this Court ruled that state courts are presumed, in their summary orders,

to have adjudicated and denied on the merits all presented claims. *Id.* at 784-85.

That presumption, however, has no place when the state court issued an *opinion* to which the federal court can look for guidance. The state court's own explanation for its action is obviously the best source for determining which claims it adjudicated; as the pre-*Richter* caselaw of the federal courts of appeals illustrates, there is no need for a presumption when a state-court opinion is at hand.

Moreover, even *Richter* contemplates a contrary result (overcoming the presumption) if there is "any indication" that the state court did not, in fact, adjudicate the federal claim—if "there is reason to think some other explanation for the state court's decision" than rejection on the merits "is more likely." 131 S. Ct. at 785. A state court's failure, in its opinion, to identify or otherwise address a specific claim is just such an "indication." Thus, if *Richter*'s presumption applied at all, the rule reflected by that prior caselaw would amount to a simple application of *Richter*'s exception—the rebutting of its presumption. As the panel below reasoned: "[W]hen a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, 'there is reason to think' that it 'is more likely' that the court simply neglected the issue." Pet. App. 24a-25a.

Thus, although two divided courts have apparently misread *Richter* as undermining their prior decisions on this point, *see Childers* v. *Floyd*, 642 F.3d 953 (11th Cir. 2011) (en banc), *pet. for cert. filed* (No. 11-42); *Brown* v. *Bobby*, 656 F.3d 325 (6th

Cir. 2011), *pet. for cert. filed* (No. 11-807), this Court's decision in *Richter* is entirely consistent with the logic and holdings of the earlier cases.

2. The Warden, in addition to invoking *Richter*, points to five cases (two from this Court) purportedly suggesting that failure to discuss a claim in an opinion indicates that the claim has been "implicitly rejected," not overlooked. (Warden Br. 29.) Like *Richter*, however, those cases are inapt and, if anything, *undermine* her position.

One involves an *argument* made in support of a claim, not a *claim* itself. *See Clemons* v. *Mississippi*, 494 U.S. 738, 747 n.3 (1990) (describing the Court's implicit rejection of "those arguments"). Of course a court is unlikely to discuss every contention, every doctrinal theory, and every policy argument urged by a party in support of his claim. But a court ordinarily *would* identify the *claims* asserted by the plaintiff. *Cf. Barclay* v. *Florida*, 463 U.S. 939, 951 (1983) (rejecting on the merits the Fourteenth Amendment claim embracing the "arguments" that *Clemons* described as having been implicitly rejected).

Another case that the Warden cites involves an argument "implicit[ly] reject[ed]" by a district court's *summary order*—"without findings or opinion." *Savage* v. *Hadlock*, 296 F.2d 417, 418-19 (D.C. Cir. 1961) (per curiam). But, as shown, the distinction between construing a summary order and construing an opinion with a glaring omission is at the crux of this case, so *Savage* does not help the Warden any more than *Richter* does.

As for a third case, *Comer* v. *Schriro*, 480 F.3d 960 (9th Cir. 2007) (en banc), the Warden quotes Judge Pregerson's *dissent*. Moreover, the state court that

he characterized as having "implicit[ly] reject[ed]" the claims was actually explicit: It identified each of those claims at the start of its opinion and declared at the end that it had "reviewed the entire record for fundamental error" and "found none." *State* v. *Comer*, 799 P.2d 333, 336, 350 (Ariz. 1990). Rather than help the Warden, then, *Comer* exemplifies what one would expect a court to do if it did not feel the need to address every claim at length—and thus drives home the reason for skepticism about opinions that fail to address at all a singular claim.

More broadly, as best illustrated by the final two cases cited, in none did any assumption of implicit rejection prejudice the claimant. In *Stewart* v. *Oklahoma*, 292 F.3d 1257 (10th Cir. 2002), the court fully considered, and rejected, an argument raised by the appellant, and "construe[d] the district court's silence as a rejection" of that argument only to clarify that the panel was "affirm[ing] the district court's implicit ruling." *Id.* at 1260. And in *Castille* v. *Peoples*, 489 U.S. 346 (1989), this Court treated a claim as having been "impliedly rejected" only in holding that the claimant had satisfied the exhaustion requirement. *Id.* at 351. It is one thing to treat an omission as implicit rejection when such treatment is inconsequential, or even beneficial to the claimant. It is quite another to hold that an omission necessarily satisfies the Warden's burden to demonstrate that a claim was adjudicated, where the effect would be to preclude the federal court from a full-fledged review of the merits of the claim. Thus, neither these cases nor *Richter* offers any reason to depart from the longstanding and well-founded consensus of the federal courts of appeals in applying AEDPA to omitted claims.

D. Refusing to presume that omitted claims were adjudicated will further sound judicial policy, by encouraging clarity in state-court opinions.

The Warden's request that this Court fashion an automatic presumption that all federal claims fairly presented to a state court have necessarily been decided by that court is, as illustrated above, inconsistent with both logic and precedent. Sound judicial policy further counsels against adopting that rule.

1. To the extent that there is any doubt, after reading a state court's opinion, which claims it adjudicated, that is because the opinion is less than pellucid. The ready solution is for state courts to be clearer. Yet a rule that presumes adjudication on the merits, and thus grants AEDPA deference blindly, would discourage clarity. By contrast, if this Court were to reject the Warden's mechanical presumption, and instead permit federal habeas courts to continue making their determinations based on full review of state-court records, state courts likely would provide clearer opinions.

In *Richter*, the Court did reject a somewhat analogous argument, on the view that penalizing state courts for issuing summary orders would "undercut state practices designed ... to concentrate its resources on the cases where opinions are most needed," 131 S. Ct. at 784; but *no* additional resources would be needed for state courts that are *already writing opinions* simply to indicate, in doing so, which claims they are resolving. Indeed, a simple declaration, at the end of the opinion, that "all other claims are meritless and are rejected" would suffice.

Courts, both federal and state, already often do this. *See, e.g.*, *United States* v. *Taylor*, 173 F.3d 538, 542 (6th Cir. 1999) ("We have considered the other claims of error made by the defendant and conclude that they do not merit discussion."); *People* v. *Lewis*, 12 Cal. Rptr. 3d 1, 3 (Ct. App. 2004) ("We conclude that the other claims of error also lack merit and affirm the judgment."); *Comer*, 799 P.2d at 350 (*see supra*, Part II.C.2). And the federal circuits recognized, before *Richter*, that such practice—"us[ing] general language referable to the merits"—could indicate an adjudication. *Norde*, 294 F.3d at 410.

Thus, contrary to the Warden's suggestion, neither "magic words" nor extensive reasoning from state courts would be necessary if her novel presumption were rejected. (*See* Warden Br. 30-31, 42-43.) *No* circuit before *Richter* required any such thing to find an adjudication for purposes of § 2254(d), nor does the Warden claim otherwise. A state court could, among other easy options, include enumeration of the claim at the start of the opinion; some identification of the claim, or language indicating its rejection, in the body of the opinion; or even, as noted, generic rejection of "all other claims" at the end of the opinion. *Cf. Norde*, 294 F.3d at 410 ("The court did not mention Norde's Sixth Amendment claims, and the opinion does not contain any language, general or specific, indicating that those claims were considered and denied on the merits.").

2. Adopting a rule that places a minimal burden of clarity on the institution best suited to ensure it—the state court—is exactly what this Court did in *Michigan* v. *Long*, 463 U.S. 1032 (1983). In that case,

the Court explained its struggle to determine whether state-court judgments rested on state law (in which case there would be no federal jurisdiction to review them) or on federal law (in which case Supreme Court review would be proper). *Id.* at 1038-42. After rejecting a series of potential approaches to such ambiguity, the Court settled on this rule: "[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court will "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41. The Court justified its rule by observing that, to avoid ambiguity—and subsequent review—a state court "need only make clear by a plain statement in its judgment or opinion" that its decision rested on state law. *Id.* at 1041.

By looking to the state courts to clarify the grounds for their decisions, the Court in *Long* effectuated an "important" principle: "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Id.* (quoting *Minnesota* v. *Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)) (internal quotation marks omitted); *see also Harris* v. *Reed*, 489 U.S. 255, 260-65 (1989) (extending, to the habeas context, *Long*'s presumption authorizing federal-court review of an ambiguous state-court judgment).

The same logic supports affirmance of the Ninth Circuit's judgment here and adoption of the longstanding consensus of the circuit courts. To avoid both ambiguity and subsequent, unfettered

habeas review, a state court "need only make clear by a plain statement" in its opinion that it adjudicated the petitioner's federal claim. *Long*, 463 U.S. at 1041. Adopting an automatic presumption of adjudication would, by contrast, effectively permit "ambiguous or obscure adjudications"—even non-adjudications—"by state courts" to "stand as barriers to a determination ...of the validity under the federal constitution of state action." *Nat'l Tea*, 309 U.S. at 557.

3. In nevertheless citing *Long* and its progeny as supposed support for *her* proposed rule, the Warden misunderstands the broader import of these authorities. (Warden Br. 38-39.) She describes them as having "held that, when faced with ambiguous state court decisions, a federal court must presume that a state court decided a case on federal-law grounds unless a state court makes a plain statement to the contrary." (*Id.* 38.) As the quotation concedes, *Long* is about determining the *grounds* for a state-court adjudication—not, as here, determining whether one occurred.

More importantly, the lesson of these cases is that federal-court review should not be obstructed by the *possibility* that a state court took certain action that would limit such review—given that the state court itself caused the ambiguity. *Long* resolved ambiguity *in favor of federal-court review*, adopting a presumption that the state court did not make the decision that would restrict such review. Applying that lesson to this case, the Court should hold that if a state-court opinion does not identify or address a particular federal claim, resulting in ambiguity (at best) over whether AEDPA restricts habeas review,

the federal court should *not* assume that adjudication on the merits took place. Rather, the court should break any arguable "tie" in favor of federal review.

E. Presuming that omitted claims were silently rejected would deprive petitioners of the one, full, fair opportunity for review that AEDPA guarantees.

Not only is the Warden's proposed rule at odds with logic, precedent, and sound judicial policy, but it also would, when it applies, prevent habeas petitioners from receiving even a single round of unfettered review of their (potentially meritorious) federal claims, notwithstanding that they diligently preserved those claims.

It should be uncontroversial that, at least *sometimes*, state courts really do overlook or ignore properly presented claims. *See supra*, Part II.A. Overburdened state courts can miss things; *pro se* filings are not always models of drafting. Yet, under the Warden's rule, there would be no way for such a petitioner to obtain *de novo* review in federal court, despite that being the first judicial evaluation of his claim. The Warden's mechanical, irrebuttable presumption of state-court adjudication of all presented claims would trigger § 2254(d)'s further presumption of a *correct* adjudication, with its highly restricted review as the result.

That result is contrary to the scheme that AEDPA presupposed and reinforced. AEDPA is designed to prevent a petitioner from getting a full-fledged "second bite at the apple." But every petitioner is allowed a first bite. Under the Warden's flat presumption, federal courts would be unable to "ensur[e] that every habeas petitioner has at least

one unfettered evaluation of her claim by a competent tribunal." *Childers*, 642 F.3d at 986 (Wilson, J., concurring in the judgment). Some claims would fall through the cracks. But it is precisely because the space AEDPA leaves open to prisoners seeking relief is so small that this Court must carefully police its boundaries, so that space does not collapse.

III. Contrary to the Warden's Alternative Argument, the Adjudication of a State-Law Claim Does Not Adjudicate a Factually Related, but Omitted, Federal-Law Claim.

Perhaps appreciating the obstacles to (and consequences of) assuming that *all* claims fairly presented to a state court were necessarily resolved by that court—even if the court suggested otherwise by omitting the claim from its opinion—the Warden also offers a somewhat narrower argument: Adjudication on the merits should be presumed, the Warden submits, at least so long as the state-court opinion "discussed the substance of the asserted trial error." (Warden Br. 27.) By this vague formulation, the Warden seems to mean that, if the state court evaluated, under *some* legal standard, allegedly wrongful facts regarding the petitioner's conviction (the "error"), that is enough to signify adjudication of *all* claims associated with those same facts—even if the state court analyzed them in the context of a distinct claim, premised on distinct law.

The Warden is wrong. AEDPA deference requires the state court to have adjudicated the "claim" *on which the petitioner seeks habeas relief*. Under well-established law, a habeas "claim" is a set of facts *and* a legal basis for relief. Therefore, for example, a

state court's adjudication of a state-law basis for relief from the introduction or exclusion of evidence hardly adjudicates a federal "claim," under the Due Process Clause, objecting to the same order. At bottom, the Warden is attempting to blur the lines between state-law claims and federal-law claims, but the two are legally and conceptually distinct, and conflating them would make a hash of habeas jurisprudence.

Nor is there any basis for a special inference that a court that rejected a state-law claim must have silently rejected a factually related federal-law claim. Unless the state-law claim fully subsumes the federal-law claim as a matter of law, discussion of the state-law issue in the court's opinion is no indication that the court engaged with the distinct, omitted federal-law issue. If anything, such an omission suggests that the state court missed the federal character of the petitioner's claim.

A. Section 2254(d) applies only if the state court adjudicated the "claim," meaning the facts *and* the legal ground for relief.

Under AEDPA, a federal court is required to defer to a state court's denial of relief only as to a "claim that was adjudicated on the merits in State court proceedings." § 2254(d). The Warden argues that this Court should define the term "claim" broadly, such that if the state court adjudicated a particular state-law challenge to a certain order, it has adjudicated every "claim" for relief based on that order, no matter how many different legal flaws the order contained. (Warden Br. 27-29, 31-33.) But that is not what "claim" means in the habeas context, and such a definition would badly distort AEDPA.

As the Warden concedes, this Court has already defined the term "claim" in the habeas and AEDPA contexts. (*Id.* 31-32.) A habeas claim is an "asserted federal basis for relief from a state court's judgment." *Gonzales* v. *Crosby*, 545 U.S. 524, 530 (2005). It includes not just "a statement of the facts that entitle the petitioner to relief" but also "reference to a specific federal constitutional guarantee." *Gray* v. *Netherland*, 518 U.S. 152, 162-63 (1996). *Richter* employed this definition, in describing claims as "grounds for relief" and referring to "the elements in a multipart claim." 131 S. Ct. at 783, 784; *see also Mayle* v. *Felix*, 545 U.S. 644, 661 (2005) (noting that Habeas Corpus Rule 2(c) instructs petitioners to "specify all [available] grounds for relief" and "state the facts supporting each ground" (internal quotation marks omitted)). In other words, simply objecting to a piece of evidence or a ruling is not enough to state a habeas "claim"; the objection must be coupled with a source of law—a right that the evidence or ruling violated. Thus, a "claim" that a court violated state law is distinct from a "claim" that it violated federal law through the same action.[3] Indeed, the former claim is *not even cognizable* on federal habeas review. *Estelle* v. *McGuire*, 502 U.S. 62, 68 (1991).

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[3] The Warden cites *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), to argue that the Court should define "claim" more broadly. There, the Court noted—in *dictum*—that "'claim' is often used in a commonsense way to mean a right or demand." *Id.* at 1729. But that statement was comparing the terms "claim" and "cause of action," and in the context of interpreting a statute about the jurisdiction of the Court of Federal Claims. It has no significance in the habeas context, where "claim" long has had a well-established meaning.

The structure of habeas law requires adherence to its well-accepted definition of "claim." A new, broader definition, under which a "claim" would encompass any sort of challenge (under state or federal law) to a given factual "error," would cause all sorts of mischief. For example, habeas jurisprudence requires that the petitioner exhaust his claim in state court before seeking federal review. *See Picard* v. *Connor*, 404 U.S. 270, 275 (1971); *supra*, Part I. Under the Warden's definition, however, it would be enough to object in general or state-law terms to an aspect of one's trial, with a more specific federal legal objection raised for the first time to the habeas court. And, even though the state court certainly would not have considered the federal issue, the federal court (under the Warden's presumption) would still need to defer to its denial of relief. Neither part of that outcome makes sense: The ready bypassing of the exhaustion rule would evade AEDPA's goal of "ensur[ing] that state proceedings are the central process." *Richter*, 131 S. Ct. at 787; *see Baldwin* v. *Reese*, 541 U.S. 27 (2003) (finding no exhaustion in such a scenario). And deferring to a decision that the state court undoubtedly never made would hardly further AEDPA's purpose of preventing federal courts from using habeas "to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010).[4]

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[4] This demanding exhaustion requirement also eliminates the Warden's professed concern that inferring, from a state court's omission of a claim, that it overlooked that claim would lead prisoners to obscure their federal claims in state court. (Warden Br. 46-47.) A habeas petitioner cannot obtain *any* review if he does not first fairly present his claim in state court and exhaust

In short, the Warden's attempt to conflate state-law and federal-law claims fails, because a habeas "claim" is defined with reference to the legal provision allegedly violated. For AEDPA's scheme to work as intended, it must be so. Therefore, if a state court resolved a state-law claim but failed to resolve a federal-law claim, the latter has not been adjudicated as a result, even if the two claims are factually related.

B. Unless state law subsumes federal law, there is no reason to infer from rejection of a state-law claim that the court silently rejected a related federal-law claim.

Nor do common underlying facts of an (addressed) state-law claim and distinct (omitted) federal-law claim change the reasons—of logic, doctrine, or policy—for recognizing that a state court's omission of the latter claim from its opinion indicates that the court overlooked it rather than resolved it *sub silentio*. Distinguishing between state- and federal-law claims is hardly formalism: The two are not only *technically* distinct (as shown) but, often, also *doctrinally* distinct.

1. The Warden emphasizes that state and federal standards may overlap, or the latter may inform the former. (*See* Warden Br. 28, 50.) She thus suggests that a state court adjudicating a state-law claim may

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(continued...)

remedies with respect to it. *See* § 2254(b)(1); *O'Sullivan*, 526 U.S. at 844-45. No prisoner would both give up his right to state-court review and risk forfeiting federal habeas review entirely, just to obtain a shot at *de novo* federal review.

well (and fairly) believe that the distinct federal-law claim adds nothing to the state-law claim it has addressed. If so, the court's silence could mean that it believed its rejection of the state claim necessarily resolved and rejected the federal claim as well—and thus that the court did make a merits determination of the federal claim, entitled to AEDPA deference.

The Warden's suggested inference could have force only in certain, narrow contexts. Specifically, where there are parallel state and federal guarantees, and the state courts have authoritatively determined that state law *adopts* the federal law, or where the state law is *always more generous* than the federal, the state claim does effectively subsume the federal claim. An obvious example could be parallel claims, under the state and federal constitutions, alleging ineffective assistance of counsel. Many States have adopted the federal test of *Strickland* v. *Washington*, 466 U.S. 668 (1984), or constructed a state-law test more protective than it. *See, e.g.*, *State* v. *Fritz*, 105 N.J. 42, 58 (1987) (adopting *Strickland*). The same may be true of claims premised on the withholding of exculpatory evidence, as state law often mimics or exceeds the federal test of *Brady* v. *Maryland*, 373 U.S. 83 (1963). *See, e.g.*, *Commonwealth* v. *Tucceri*, 412 Mass. 401, 413 n.11 (1992) (adopting state-law test "more favorable to defendants than the Federal Constitutional standard").

In such cases, it may make practical sense to infer that the state-court's adjudication of the state-law claim included adjudication of the doctrinally subsumed or identical—albeit technically distinct—federal claim. Indeed, circuit courts have recognized

this reality. Federal habeas courts, in the scenario in which the state court in its opinion expressly rejected the state-law claim but ignored a truly narrower, parallel federal-law claim, have held that, absent any contrary indication, the latter should be deemed to have been adjudicated. *See, e.g.*, *McCambridge* v. *Hall*, 303 F.3d 24, 35 (1st Cir. 2002) (en banc) ("If there is a federal or state case that explicitly says that the state adheres to a standard that is more favorable to defendants than the federal standard (and it is correct in its characterization of the law), we will presume the federal law adjudication to be subsumed within the state law adjudication."). To the extent that this narrow rule is all the Warden seeks to establish, *amicus* has no objection to the basic reasoning.

But, quite often, a shared set of facts will give rise to colorable state-law and federal-law grounds for relief that are doctrinally distinct—where rejection of the one does not imply or presuppose rejection of the other. These claims are legally independent and distinct, not just in *form* but also in *substance*. A quintessential example would be the admission of evidence, triggering a hearsay objection under state law and a federal constitutional objection under the Confrontation Clause. Just because the admission of evidence is permissible under state hearsay exceptions does *not* necessarily make the admission permissible under the Sixth Amendment. *See, e.g.*, *Crawford* v. *Washington*, 541 U.S. 36, 51 (2004); *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2539-40 (2009). Similarly, many States have enacted speedy-trial statutes. But these can be violated even if the Sixth Amendment's Speedy Trial Clause is not; and vice versa. *See Nelson* v. *Hargett*, 989 F.2d 847,

851 n.2 (5th Cir. 1993) ("[A] state's compliance with its own speedy trial statute will not insulate it from constitutional attack."); *State* v. *O'Brien*, 516 N.E.2d 218, 221 (Ohio 1987) (recognizing that "the constitutional guarantees may be found to be broader than speedy trial statutes").

In these situations, the underlying facts—or "error," in the Warden's obscuring words—may be the same for purposes of the state-law claim and the federal-law claim, but the required legal analysis is different. As such, the adjudication of the state-law claim cannot be taken as indicating an effective disposal on the merits of the federal-law claim. If anything, in this situation the inference that the state court overlooked the omitted claim is *stronger*, because the selective analysis suggests that the court missed the federal claim in its focus on the state claim, or perhaps erroneously believed that only a state claim had been asserted.

2. The case of *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam), illustrates this contrast between situations where state law subsumes federal law and situations where state-law and federal-law claims are legally independent.

Although the Warden cites and discusses *Early* at length, as somehow bearing on whether an adjudication has occurred, it was undisputed in that case that the state court had adjudicated the federal-law claim. *See* Warden Br. 34; 537 U.S. at 8. The question, instead, was whether, under § 2254(d)'s standard of review, that adjudication had been "contrary to, or involved an unreasonable application of, clearly established Federal law" because the state court had failed to cite federal law. 537 U.S. at 7.

Nevertheless, *Early* does identify the limited circumstances in which adjudication of a state-law claim might practically subsume, and thus fairly indicate, adjudication of a related federal-law claim. In rejecting any requirement that a state court in adjudicating a federal claim cite federal law, the *Early* Court observed that the state court had "cited instead decisions from the California Supreme Court that impose even *greater* restrictions for the avoidance of potentially coercive jury instructions." *Id.* at 8. But *Early* hardly suggests that, if the state and federal claims lack such a doctrinal relationship, the habeas court should nonetheless presume that the state court adjudicated the omitted federal claim.

3. In this case, the Warden vaguely asserts that Respondent's federal-law claim was "intertwined with" her state-law claim and that the applicable California law "had its foundation in federal constitutional principles." (Warden Br. 48, 50.) But it is telling that the Warden cannot and does not claim that § 1089 of California's Penal Code is *necessarily at least as generous* to defendants as the Sixth Amendment. That is because, as Respondent shows, it is not. (*See* Resp. Br. 49-56.) As such, Respondent's state-law claim did not subsume her federal-law claim; and the state court's adjudication of her state-law claim did not subsume adjudication of her federal-law claim—leaving the latter un-adjudicated and AEDPA deference inapplicable.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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